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In The

Supreme Court of the United States

OCTOBER TERM, 1968

No. 773

JOSEPH A. F. VALENTI,

Appellant,

v.

NELSON A. ROCKEFELLER, Governor of the State of New York, and JOHN P. LOMENZO, Secretary of State of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

The Appellant, pursuant to Rules 13 (2) and 15 of the Supreme Court of the United States, files this statement as to jurisdiction to contend that this Court has jurisdiction on direct appeal to review the final order dismissing plaintiff's complaint for an injunction and declaratory relief, and to secure an order of this court noting probable jurisdiction in this case.

Opinions Below

The district court delivered two opinions in this case. The majority opinion, written by the Hon. J. EDWARD LUMBARD, Chief Judge of the United States Court of Appeals for the Second Circuit, dismissed the complaint.

The Hon. JOHN O. HENDERSON, Chief Judge of the United States District Court for the Western District of New York, concurred with Chief Judge Lumbard. The dissenting opinion, written by the Hon. MARVIN E. FRANKEL, United States District Judge in the Southern District of New York, sustained the complaint. Both opinions, pursuant to Rule 15 (1) (h) are appended hereto and marked as Appendix "A". There is no official citation as yet to these opinions.

Jurisdiction

The appeal herein is from a final order dismissing the plaintiff's complaint made and entered in the United States District Court for the Western District of New York by a specially constituted three-judge panel convened therein under 28 United States Code, Section 2281 and 2284.

(i.) The Complaint sought declaratory and injunctive relief against the provisions of Section 296 of the Election Law of the State of New York for repugnance to the provisions of the Seventeenth Amendment to the Constitution of the United States and Article 4, Section 4 which guarantees to each state a republican form of government. The Complaint rested on 42 United States Code 1983 and 1988, the Civil Rights Act.

(ii.) The final order dismissing the complaint from which this appeal is taken was made and entered on November 13, 1968. Notice of Appeal was filed on November 18, 1968 in the United States District Court for the Western District of New York.

(iii.) The Supreme Court of the United States has jurisdiction to review by direct appeal the final order above cited pursuant to the terms of 28 United States Code, Section 1253.

(iv.) The following decision sustains the jurisdiction of the Supreme Court to review this order on direct appeal. *Reynolds v. Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

(v.) The validity of Section 296 of the Election Law of the State of New York is involved, as amended by the terms of Section 191 (a) of the Election Law. Their texts follow:

Section 296.

United States senators. — At the general election next preceding the expiration of the term of office of a United States senator from this state, a United States senator shall be elected by the people for a full term of six years. If a vacancy occur in the office of United States senator from this state in any even numbered calendar year less than sixty days prior to an annual fall primary election, or thereafter during said even numbered year, the governor shall make a temporary appointment to fill such vacancy until the first day of December in the next even numbered calendar year. If such vacancy occur in any even numbered calendar year sixty days or more prior to an annual fall primary election, the governor shall make a temporary appointment to fill such vacancy until the first day of December in such even numbered calendar year. If a vacancy occurs in the office of United States senator from this state in any odd numbered calendar year, the governor shall make a temporary appointment to fill such vacancy until the first day of December in the next even numbered calendar year. Such an appointment shall be evidenced by a certificate of the governor which shall be filed in the office of the secretary of state. At the time of filing such certificate, the governor shall issue and file in the office of the secretary of state a writ of election directing the election of a United States senator to fill such vacancy for the unexpired term at the general election next preceding the expiration of the term of such appointment.

Section 191.

Dates of Primary Elections and General Elections; Time of Opening and Closing Polls.

1.a. A primary election, to be known as the spring primary, shall be held in the year 1966 and annually thereafter, on the third Tuesday in June before the general election. All of the provisions of law relating to the spring and fall primary elections shall apply to the spring primary election provided for by this paragraph as hereby amended. All references to the spring and fall primary elections contained in this chapter shall be construed as references whenever appropriate and applicable, to such spring primary election.

Questions Presented

Whether Section 296, as modified by Section 191 (a), of the Election Law of the State of New York violates the provisions of Article 4, Section 4, and the terms of the Seventeenth Amendment, to the Constitution of the United States. The text of the Seventeenth Amendment follows:

Amendment XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: PROVIDED, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Statement of the Case

On June 5, 1968, ROBERT F. KENNEDY, then junior United States Senator from the State of New York was shot in the Ambassador Hotel in Los Angeles, California. He died at the Good Samaritan Hospital, Los Angeles, the next day, June 6, 1968. As a result of his death, the office of United States Senator from New York became vacant.

Neither of the defendants, appellees herein, took any steps to comply with the Seventeenth Amendment's vacancy provisions respecting the election to office of a successor United States Senator. They announced in newspaper interviews that an appointment under Section 296, as modified by Section 191 (a), of the New York Election Law, would be made shortly.

Accordingly, on July 16, 1968, the plaintiff, DR. JOSEPH A. F. VALENTI, Assistant Dean of St. John Fisher College, Rochester, New York, brought suit against the Governor and Secretary of State under the Civil Rights Act demanding injunctive relief and compelling an election to fill the vacancy on or before November 5, 1968.

On July 17th, in Manhattan, one RANDOLPH PHILLIPS filed the same suit, and on July 19th, one GEORGE BACKER filed the same suit, both in the Southern District of New York.

On July 29th, Chief Judge Henderson of the Western District ordered the convocation of a three-judge panel pursuant to 28 United States Code 2281 et. seq., and denied motions for consolidation of the suits in the Western District.

On July 31st, Chief Judge J. EDWARD LUMBARD assigned Chief Judge HENDERSON and Southern District Judge MARVIN E. FRANKEL to sit on the three-judge Court, and, in addition, fixed August 7th, 1968 as the time

for oral argument of all the lawsuits, such argument to occur at Foley Square, in the City of New York, New York. The argument was so held.

On September 23rd, 1968, plaintiff herein asked for an order to show cause in the form of interlocutory relief directing defendants to prepare for the possibility of an election on November 5, 1968. The request was made first to JUDGE HENDERSON, who declined to entertain it, and next to JUDGE LUMBARD, who never acted upon it. Plaintiff awaited a decision on whether the Court would direct a prompt election to fill the Senate vacancy until October 27, 1968. At that time, he sent a petition and motion to this Court asking for leave to file an application for the issuance of an extraordinary writ of mandamus on the ground that, by delay, the Court was ruling against the plaintiff without enabling him to appeal from an order or decree to that effect. The motion and petition was filed on October 29, 1968. See Miscellaneous No. 1065, October Term, 1968. The decision on November 13, 1968 in the principal case mooted the mandamus motion.

The Questions Are Substantial

From the complaint and the opinions in this case, it is clear that what is involved is the first judicial scrutiny of the vacancy paragraph of the Seventeenth Amendment to the Constitution of the United States in the federal courts. All fifty states have statutes which, by the great variety in their terms, attest to the need for a judicial interpretation of the Seventeenth Amendment in this Court. No other tribunal can supply the needed uniformity of interpretation which a decision of this Court automatically requires. Questions of this magnitude are obviously entitled to plenary hearing with briefs and oral argument.

CONCLUSION

Appellant respectfully prays that this Court note probable jurisdiction in this cause and place the case upon its calendar for argument.

DATED: November 18, 1968

Respectfully submitted,

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MAJORITY OPINION BY HON. J. EDWARD LUMBARD, CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States District Court

Western District of New York

JOSEPH A. VALENTI, 6 Boughton Avenue, Pittsford, New York, for himself and for all persons similarly situated,

Plaintiff,

vs.

NELSON A. ROCKEFELLER, Governor of the State of New York, Executive Mansion, Albany, New York; and JOHN P. LOMENZO, Secretary of State of the State of New York, State Capitol Building, Albany, New York,

Defendants.

W.D.N.Y. Civil Action No. 1968-224

Appearances:

Robert L. Bobrick, Esq., New York, N. Y., Attorney for Plaintiffs, Randolph Phillips, et al.

Jerome M. Kay, Esq., New York, N. Y., Attorney for Plaintiff, George Backer.

John Manning Regan, Esq., Rochester, New York (Hogan and Regan, Esqs.) Attorneys for Plaintiff, Joseph A. Valenti.

Ruth Kessler Toch, Solicitor General and Jean M. Coon, Assistant Attorney General, of counsel; Louis J. Lefkowitz,

Attorney General of the State of New York, Attorneys for Defendants.

Before: Lumbard, Chief Circuit Judge, Henderson, Chief District Judge and Frankel, District Judge.

Three suits for an injunction and a declaration that the Seventeenth Amendment to the United States Constitution requires that the vacancy in the United States Senate created on June 6, 1968, by the death of Senator Robert F. Kennedy, be filled by election in November, 1968, rather than in November, 1970, as required by New York Election Law § 296. A three-judge court was convened to hear all three actions pursuant to 28 U.S.C. §§ 2281, 2284. The court, Frankel, District Judge, dissenting, held that the provisions of Election Law § 296 did not exceed the permissible limits of discretion conferred upon the states by the Seventeenth Amendment concerning the time and conduct of Senate vacancy elections.

The complaints are dismissed.

LUMBARD, Chief Circuit Judge:

These three suits brought by New York voters[1] against the Governor and the Secretary of State sought a determination that the Seventeenth Amendment to the United States Constitution requires that the Senate vacancy created by the death of Senator Robert F. Kennedy on June 6, 1968, be filled at the November, 1968 general election. Since

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[1]The Attorney General does not attack plaintiffs' standing, as voters of New York, to bring this action. We find that this case presents that "concrete adverseness" which is the "gist" of the standing question, Baker v. Carr, 369 U. S. 186, 205 (1962), and hold that plaintiffs, alleging that their right to vote to fill a Senate vacancy will be curtailed, have sufficient standing to maintain this action.

See Gray v. Sanders, 372 U. S. 368, 375 (1963).

this vacancy arose less than 60 days prior to New York's regular spring primary in an even-numbered year, under New York Election Law § 296 the vacancy will be filled at the general election in the next even-numbered year, in this instance November, 1970. The Governor is empowered to make a temporary appointment, with the appointee serving until December 1, 1970.[2]

Plaintiffs contend that § 296, by authorizing a delay of approximately 29 months before an election is held to fill this Senate vacancy, infringes upon the principle of popular election of Senators declared by the Seventeenth Amendment, and violates the vacancy provision of that Amendment:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

Plaintiffs read this provision as permitting a "temporary" appointee to serve only until the vacancy can be filled by the people at the next "regularly scheduled election if there is sufficient time between the happening of the vacancy and the scheduled election;"[3] In the circumstances of this case they argue that the election must be held in November, 1968, even though the candidates for the vacancy could not have been selected this year through the state's normal procedure[4] of nominations by the party

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[2]On September 10, 1968, Governor Rockefeller appointed Representative Charles Goodell to fill the vacancy.

[3]Brief of plaintiff Valenti, pp. 15-16.

[4]Election Law §131 (McKinney Supp. 1968).

committees in March or April followed by a popular primary in June preceding the election.

We hold that the provisions of New York Election Law § 296 do not exceed the discretion conferred on the states by the Seventeenth Amendment with respect to the timing of vacancy elections and the procedures to be used in selecting candidates for such elections. Substantial state interests are furthered by the decisions of the New York Legislature that Senate vacancy elections be held only in conjunction with regular congressional elections, and that candidates for vacancy elections be selected through the state's modified direct primary system.

Our decision is strongly influenced by the fact that from the ratification of the Seventeenth Amendment in 1913 down to the present day most state legislatures have interpreted its provisions as authorizing the enactment of vacancy election statutes very similar to the New York law attacked here. Accordingly we find that an election in November, 1970 to fill this Senate vacancy will be in compliance with the Amendment.

These actions were commenced almost simultaneously, the Valenti suit in the Western District of New York on July 16, and the Phillips and Backer suits in the Southern District of New York on July 17 and 19 respectively. On July 29, 1968, Chief Judge Henderson certified the need in the Valenti case for the appointment of a three-judge court, 28 U.S.C. §§ 2281, 2284, and Judge Frankel did likewise with regard to the other two suits on July 30. To facilitate prompt disposition of the common question, identical three-judge courts were designated in each case; Judge Henderson was assigned to sit as the third judge in the Southern District cases and Judge Frankel was assigned to sit as the third judge in the Western District case. By

agreement of all the parties argument of all three cases was heard on August 7th in the Southern District.

A brief review of the New York legislation dealing with Senatorial vacancy elections is in order before we examine the current § 296 in the light of the Seventeenth Amendment. Under the state's first statute the vacancy election was to be held at the next annual November general election which occurred at least 30 days after the vacancy arose. Laws 1913, ch. 822. In 1947 the law was amended to require that the election be held at the annual November election in the first year in which at least 60 days intervened between the creation of the vacancy and the September fall primary. Laws 1947, ch. 623. If either of these two laws were in effect today the vacancy caused by the death of Senator Kennedy would have been filled at the November, 1968 election.

However, under the terms of Laws 1951, ch. 257, a Senatorial vacancy election must be held in an even-numbered year. Furthermore, New York now conducts its primary election in June rather than in September. Laws 1965, ch. 1070, applying by its terms to Election Law § 296.[5] The

---

[5]Election Law §296 actually uses the word "fall" rather than "spring" primary. But New York in 1965 replaced its fall primary with a spring primary to be held each third Tuesday in June. Laws 1965, ch. 1070 (effective Jan. 1, 1966.). Election Law §191(1)(a) (McKinney Supp. 1968), provides that all references to fall primaries in the Election Law shall be construed as references to the spring primary "whenever appropriate and applicable." Plaintiffs Backer and Phillips argue that §296 presents one instance where such a construction is not appropriate, and that therefore as a matter of state law the vacancy election must be held in November, 1968. However, they cite no support for this argument.

Since we agree with the Attorney General and plaintiff Valenti that the application of §191(1)(a) to §296 is not "fairly subject to dispute," Zwicker v. Koota, 389 U. S. 241, 251 (1967), this court need not abstain from deciding the constitutional question presented until a state court has had an opportunity to construe this issue of statutory construction. *See* Davis v. Mann, 377 U. S. 678, 690-91 (1964).

candidates for a Senate vacancy must be selected at this primary, unless the nominees chosen by the party committees prior to the primary are not challenged. Election Law § 131(4) (d) (McKinney Supp. 1968). Therefore, under current New York law the vacancy involved in this case cannot be filled either at the 1968 election, since it occurred less than 60 days prior to the spring primary on June 18, or at the election to be held in the odd-numbered year of 1969. The interval of 29 months which will occur in this instance between the vacancy and the election to fill it in November, 1970, is only six weeks shorter than the maximum interval possible under the terms of § 296.

Plaintiffs' main argument has been that the Seventeenth Amendment requires the vacancy election to be held in November, 1968.[6] In effect, they ask us to hold that the importance under the Amendment of holding a prompt election outweighs the state's interest in following its normal procedure for the selection of candidates through a spring primary. New York Election Law § 131, *as amended* Laws 1967, ch. 716, § 2. Had we required that the election be held in 1968, presumably the nominees would have had to have been selected by the state com-

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[6]Regardles of the constitutional merits of plaintiffs' argument for a 1968 election, all members of this court have been agreed since the oral argument, held on August 7, that such a remedy was not posible from a practical standpoint in this instance. It was obvious after argument that this court would be compelled to do considerable research on the case before handing down any opinion and that an appeal to the Supreme Court was a virtual certainty. Thus sufficient time would not remain following the final resolution of this litigation to permit the political parties to nominate candidates and conduct a campaign prior to the election on November 5th. In view of this conclusion that the vacancy could not, in any event, be filled at the 1968 November election we took no action regarding the motion of plaintaiff Valenti, filed September 23, for an order suspending certain provisions of New York's election law to make possible an election this year.

mittee of each party pursuant to Election Law § 131(7), without the possibility of these selections being challenged at a direct primary.

Since we reject the suggestion that an election in 1968 is constitutionally required, we must also answer another question: Does the Seventeenth Amendment prohibit New York from bypassing its general election in 1969 in favor of filling the vacancy in November, 1970?

In order to assess the constitutionality of § 296 as applied in the circumstances of this case we turn first to the wording of the Seventeenth Amendment.

The Seventeenth Amendment's vacancy provision explicitly confers upon the state legislatures discretion concerning the timing of vacancy elections. If the legislature authorizes the governor to make a temporary appointment, the appointee may hold office "until the people fill the vacanc[y] by election *as the legislature may direct.*" (emphasis added) . Despite this clear language plaintiffs contend that the proviso only allows the legislature to regulate the governor's power of temporary appointment and not the timing of vacancy elections. They base their interpretation on a rather subtle reading of the 1892 congressional resolution which first contained this vacancy provision.[7] But we believe that we must give effect to the

---

[7] In 1892 Rep. Tucker of Virginia proposed a constitutional amendment which provided for the direct election of Senators, and also contained the following language:

> "The times, places, and manner of holding elections for Senators shall be prescribed in each State by the legislature thereof.
>
> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, that the legislature of any State may empower the executive thereof to

natural reading of the Seventeenth Amendment as adopted since there is no indication that the Congress which proposed the Amendment, or the state legislatures which ratified it, intended a different meaning. This natural reading grants to the states some reasonable degree of discretion concerning both the timing of vacancy elections and the procedures to be used in selecting candidates for such elections. This interpretation gains support from Art. 1, § 4 of the Constitution which gives to the state legislatures the initial power to prescribe the "times, places and manner of holding elections for Senators and Representatives . . . ." If the drafters of the Seventeenth Amendment had intended to bring about a radical departure from

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make temporary appointments until the people fill the vacancies by election, as the legislature may direct." H.R. Rep. No. 368, 52nd Cong., 1st Sess. 1 (1892).

The vacancy provision in this latter paragraph is identical to the one incorporated in the Seventeenth Amendment in 1912, with the exception that in the Amendment there is no comma between the word "election" and the phrase "as the legislature may direct." Plaintiffs claim that the presence of this comma in Tucker's draft shows that the last phrase of the provision was intended to refer only to the tempory appointment authorization, and not to "election."

But the plaintiffs main argument centers on the portion of Tucker's draft, struck from the Amendment on the floor of the Senate in 1912, which would have given exclusive control over the timing of Senatorial elections to the states. Plaintiffs urge that Tucker could not have had in mind the repetitious purpose of again giving the legislatures control over the timing of vacancy elections in this second paragraph. Therefore in order to avoid reading "as the legislature may direct" in a sensible, non-repetitive manner, plaintiffs say we must construe it as applying only to the Governor's temporary appointment power.

It is sufficient to say that plaintiffs' interpretation of the 1892 proposed amendment is argumentative at best; perhaps Tucker wanted to reemphasize the control of the states in the special case of vacancy elections. Moreover, it is clear that Representative Tucker himself believed that his vacancy provision gave to the legislatures some discretion concerning the timing of vacancy elections. *See* note 21, *infra*.

We do not venture an opinion whether Tucker's comma was lost through an act of commission or neglect.

this normal rule of state discretion in the instance of the timing and manner of holding vacancy elections, such as by requiring special elections, it is likely that they would have employed clear language to that effect; of course they did employ such clear language in requiring that the states elect their Senators through a popular vote.

But we do agree with plaintiffs that the Amendment's drafters did intend to place some limit on the discretion of the states concerning the timing of vacancy elections by specifying that a Governor may make only a "temporary" appointment until an election is held. We would have difficulty, for example, squaring the word "temporary" with a statute providing that the Governor's appointee is to serve out the remainder of a term regardless of its length. The question before this court is whether § 296 exceeds the limits of the discretion conferred upon the states by the Amendment.

It is highly significant that most legislatures, as indicated by the Senatorial vacancy statutes of the 50 states,[8] have interpreted the Seventeenth Amendment as granting to the states a discretion concerning the conduct of vacancy elections sufficiently broad to encompass the terms of New York Election Law § 296. More particularly, these statutes reflect a consensus of the states that it is permissible for a "temporary" appointee to hold office until the next regular congressional election before which there remains sufficient time to nominate candidates and conduct a campaign.

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[8]Appendix A to this opinion presents in tabular form the original and current laws of the state concerning the timing of Senate vacancy elections. Appendix B contains the citations to the original and current Senate vacancy statutes of the 50 states.

TABLE I

MAXIMUM PERIOD OF DELAY AUTHORIZED BY SENATE VACANCY STATUTES* BETWEEN OCCURRENCE OF VACANCY AND THE VACANCY ELECTION

Timing of Vacancy Election	Maximum Delay Authorized Before Election	Number of States Having Provision in: 1915**	1968***
Special Election by Order of Governor	No specific authorization of delay	2	0
Special Election within one year of creation of vacancy	One year	9	5
Next annual ("general" or "municipal") election	One year, plus time for nominations****	4	3
Next biennial ("general", "congressional", "regular" or "state") election	Two years, plus time for nominations	23	40
		38	48
States with laws requiring election within approximately one year of creation of vacancy		15	8
States with laws allowing interval of approximately two years or more before election		23	40

*See appendix A for classification of each state; see appendix B for statutory citations.

**The statutes of Missouri and Oregon in force in 1915 are not classified because of the vagueness of their provisions.

***The Missouri statute in force in 1968 is not classified because of its vagueness. Oklahoma has no vacancy statute currently in force.

****See Table II, *infra*, for time interval required for nomination procedures by the state statutes.

In the three years following the ratification of the Seventeenth Amendment, 1913 through 1915, 40 states passed statutes regulating the timing of Senate vacancy elections, and in most instances authorizing the governor to make a temporary appointment until the election was held. As Table I shows, 23 of these 40 states provided that a vacancy in the Senate be filled at the next regular biennial statewide election at which it was practical to do so. The precise wording used in these statutes varied slightly. In most the date was described as the next "general" election; in others it was termed the next "congressional" election; and in still others the description next "state" or simply "regular" election was used. But the effect of all of these terms was the same as that resulting from the requirement of New York's § 296 that vacancy elections be held only in "even-numbered" years: a delay of two years could occur before a Senatorial vacancy was filled by the voters at an election.

It is true that 13 of the states which acted between 1913 and 1915, including New York, Laws 1913, ch. 822, did pass statutes which required that an election be held within approximately one year from the occurrence of a vacancy; two more provided that a special election should be held but specified no date. But the fact that these legislatures chose to provide for vacancy elections within approximately one year cannot be taken as proof that they believed themselves without power under the Seventeenth Amendment to authorize that a longer interval occur before the election.

In the years since 1913 the states, in light of their experience in filling Senatorial vacancies, have taken a more liberal view of their power under the Amendment; many more states now require that Senatorial vacancy elections

be held only in conjunction with the biennial congressional elections. Thus today the statutes of 40 states in effect establish such a policy; only eight states require that an election be held within approximately one year after a vacancy has arisen.[9]

While this impressive coincidence of contemporaneous interpretation and subsequent practice among the states is not sufficient alone to resolve this case, there is ample authority for relying on this evidence as one persuasive guide to constitutional construction.

In McPherson v. Blacker, 146 U.S. 1 (1892), a Michigan statute providing for the election by district of presidential electors was challenged as violating Article II, § 1, cl. 2 of the Constitution, which provides:

> "Each State shall appoint, in such Manner *as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." (emphasis added)

A unanimous Supreme Court upheld the statute, placing great emphasis on the widely varying state legislation contemporaneous with, and subsequent to, the ratification of the Constitution. This "practical interpretation," the Court felt, supported viewing the clause in question as granting broad discretion to state legislatures regarding the manner of choosing electors. The Court made this comment:

> "The framers of the Constitution employed words in their natural sense; and where they are plain and

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[9]No attempt is made to classify the ambiguous current vacancy statute of Missouri, although it apparently does not require special elections. Oklahoma has no vacancy statute currently in force. See Appendix B for exact citations.

clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled. *Stuart v. Laird,* 1 Cranch, 299, 309." 146 U.S. at 27.

Of similar import is *Smiley v. Holm,* 285 U.S. 355 (1932):

"The practical construction of Article I, section 4, [relating to the state's power to set the time, place, and manner of holding Congressional elections] is impressive. *General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny.* Certainly, the terms of the constitutional provisions furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the States." 285 U.S. at 369 (emphasis added)

See Cooley v. Board of Wardens, 53 U.S. 298, 314-15 (1852); *cf.* Ray v. Blair, 343 U.S. 214, 229-30 (1952).[10]

There is little doubt that the problem of holding Senate vacancy elections has been subjected, in the phrase of *Smiley v. Holm*, to "careful scrutiny" by the states. There were 156 temporary appointments to the Senate in the years from 1913 to 1967.[11] That in the light of this experience more and more states have chosen to adopt vacancy statutes similar to § 296 provides a firm basis for the conclusion that substantial state interests are furthered by the formula which New York has adopted. It should be noted that not until 1949 did New York experience the necessity, under its previous statute, of holding elections for the same Senate seat in two successive years. This probably explains why New York did not adopt the prevailing form of vacancy statute — deferring the election until the next congressional election — until 1951.

We find that there are at least three substantial state interests which are furthered by the requirement of § 296 that Senate vacancy elections be held only in "even-numbered" years. It is in those years, when either a

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[10]These cases should be compared with the recent Supreme Court decision in Williams v. Rhodes, 37 U.S.L.W. 4001 (Oct. 15, 1968). There the statutes of 42 states were squarely contrary to the provisions of the Ohio law invalidated under the equal protection clause. *Id.* at 4009 n. 9. The Court also noted that the experience of other states under their statutes tended to refute the justification presented by Ohio for its law. *Id.* at 4009.

[11]Senate Manual, S. Doc. No. 1, 90th Cong., 1st Sess. 715 (1967) [hereinafter cited as Senate Manual]. The vacancies and appointments occurring between 1919 and 1964 are listed in Clem, *Popular Representation and Senate Vacancies*, Midwest Journal of Political Science, Feb. 1966, 52, 58-65. This article contains a helpful background discussion of the Senate vacancy problem.

United States President or a Governor of New York is elected, and when all the members of the House of Representatives are elected, that voter interest and turnout are at a maximum; this is obviously a more desirable time to fill as important an office as United States Senator. The New York "general" elections in odd-numbered years in fact are dominated by local county and city elections; the only statewide elections concern the often uncontested positions on the New York Court of Appeals and occasional proposals to amend the state constitution. The Legislature might reasonably have concluded that local elections should be preserved from the more party-oriented political currents generated by statewide or national contests.

Moreover, it would be considerably more difficult for Senate candidates to finance a campaign in an off-year; they must carry most of the burden themselves since the party organizations do not usually collect funds in such years to conduct campaigns regarding national issues. Of course, the greater use of television in recent campaigns places those candidates unable to raise large sums of money at a great disadvantage, particularly in New York with over 83,000,000 registered voters, many of whom could not be effectively contacted by any other means. Finally, the experience of New York under its previous vacancy law with successive Senatorial elections in 1949 and 1950,[12]

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[12]Under the original 1913 vacancy provision in New York an election was held in November, 1949, to fill the seat left vacant by the resignation of Senator Robert F. Wagner on June 28, 1949; Herbert Lehman defeated John Foster Dulles, whom Governor Dewey had appointed to the post on July 7, 1949. In 1950 another election was held since Senatoe Wagner's original term was about to expire; Senator Lehman defeated Joe R. Hanley.

The Wagner vacancy was the first to occur in New York which resulted in an "off year" vacancy election. The vacancy created by the death of Senator Copeland on June 17, 1938, was filled at the November 1938 general election. *See* Clem, *supra*, note 11, at 60.

apparently gave rise to the conclusion that the inconvenience and expense to the state of this procedure outweighed any advantages to be derived from having a more prompt vacancy election than is now required by § 296.

We believe that it was to allow the different states to take account of considerations such as these that the vacancy provision of the Amendment granted to the legislatures an area of discretion.

While we have seen that a clear concensus has developed among the states concerning the appropriateness of conducting vacancy elections only in congressional election years, no such consensus is reflected in the provisions governing the time which must lapse between the occurrence of the vacancy and the election at which it is filled. As Table II below indicates, seven of the 40 laws passed from 1913 to 1915 explicitly required that some period intervene between the creation of a vacancy and the holding of an election to fill it. The obvious purpose of the provisions was to allow time for the party nominees to be selected and for a campaign to be conducted by the nominees. Only one statute, that of Pennsylvania, specifically provided that the candidates were to be selected through a primary procedure. Although none of the early statutes required a delay as long as the seven month period which must now intervene under § 296 between the occurrence of a vacancy and an election to fill it, a few provided for delays of almost this length. Ohio Laws 1914, House Bill No. 3 (180 days); Mich. Laws 1915, No. 156 (120 days). Moreover ,the wide variation in the provisions of these statutes reflects an interpretation of the Amendment which would allow the states a liberal degree of discretion concerning the procedures to be used in the selection of candidates for Senate vacancy elections.

TABLE II

MINIMUM PERIOD OF DELAY *REQUIRED* BY SENATE VACANCY STATUTES* BETWEEN OCCURRENCES OF VACANCY AND THE VACANCY ELECTION

Minimum Delay Required	Number of States With This Requirement in: 1915	1968
No specific requirement	33	27
1-89 days	4	8
90-180 days	2	6
Period between primary and election, plus 40-70 days	1	8
	40	49**

*See appendix A for classification given to each state; see appendix B for citations to state statutes. All states having vacancy statutes are included in this table.

**Oklahoma has no vacancy statute currently in force.

The diversity among these provisions has continued to the present. See Table II. Most states still do not specifically provide for a delay between the vacancy and the election, although surely the need for at least some delay to allow for the nomination of candidates is implicit in all of the statutes. The current vacancy statutes of 22 states require that there be some interval before the election is held. The intervals required by the laws of four states exceed the interval which has occurred here under § 296 between the occurrence of the Kennedy vacancy and the November, 1968 election. Me. Rev. Stat. Ann. tit. 21, §§ 1531, 448 (1964-65) (60 days prior to June primary); Ohio Rev. Code Ann. § 3521.02 (Baldwin 1968) (180 days); Wis. Stat. Ann. § 17.18 (Supp. 1968) (60 days prior to July primary); *see* So. Dak. Code §§ 16.0602 (1939), 16.0202 (Supp. 1960) (sufficient time before June primary) (by

implication). In eight states,[13] including New York, the interval is for the purpose of conducting a primary.

We do not believe it a matter of constitutional significance that the delay before the election required under § 296 is a few months longer than is required by most other states due to New York's decision to conduct a primary, and to hold it in June. We interpret the Seventeenth Amendment, as have most of the state legislatures, to allow the states to conduct Senate vacancy elections in accordance with their regular election procedures, so long as those procedures further substantial state interests.

New York's decision to require candidates for a vacancy election to be selected subject to a direct primary is supported by policy considerations even more compelling than those which justify the prohibition of vacancy elections in "off-years."

New York did not have a direct primary election for statewide candidates, including Senators, until 1967. Laws 1967, ch. 716, § 2; Election Law § 131 (McKinney Supp. 1968). Prior to this law the people voted only for delegates to their party's nominating convention, and the convention nominated the candidates. There was recurrent public debate over whether this procedure resulted in

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[13]Hawaii, Maine, Maryland, Massachusetts, Minnesota, New York. South Dakota had such a requirement by implication; see Appendix B. Both Maine and South Dakota, like New York, hold their primaries in June. See Appendix B for citations.

See Appendix B for statutory citations.

Although we have not been able to research thoroughly this point, it appears that every state with the exception of Indiana now has some general system of direct primary elections. *See* N. Y. Times, July 23, 1965, p. 32, col. 5. It is very likely that several of the states which require that a specific interval occur between a vacancy and an election, see Table II in text, do so for the purpose of enabling candidates for the vacancy to be selected through the regular primary procedure.

"boss" dominated conventions,[14] and the 1967 statute was the culmination of recurrent efforts to provide some means of challenging the convention's nominee at the polls. Under the law a meeting of each party's state committee selects a candidate, but this choice may be challenged in the June primary by anyone receiving at least 25% of the delegate votes cast on any ballot at the committee meeting, Election Law § 131(3) (Supp. 1968), or by anyone who is able to gather supporting signatures from at least 5%, or 10,000, of the party's enrolled voters. Election Law, § 136(2) (a) (Supp. 1968). In 1968 the Democratic Party's voters selected at the primary the candidate who had gotten on the ballot through the signature petition method,[15] rather than the candidate who had received the designation of the party's state committee.

If we had ruled that the need for a prompt election in 1968, or shortly thereafter,[16] outweighed the state's interest in conducting a primary, the nominees for the vacancy would have had to have been selected by the few hundred members of the state committee of each party, rather than by the several million enrolled party members. Election Laws, § 131 (7). The choice, then, is between securing a prompt decision by the people between the nominated candidates, and delaying that decision in order for the people to participate directly in the nominating process. We believe, and hold that the drafters and ratifiers of the Seventeenth Amendment believed, that this type of choice between election procedures is best left to the discretion

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[14]See, e.g., N. Y. Times, July 23, 1965, p. 32, col. 5.

[15]Paul O'Dwyer defeated Eugene Nickerson, the nominee designated by the party convention, and Rep. Joseph Resnick, who achieved a position on the ballot by virtue of having received over 25% of the ballots cast at the convention.

[16]*See* note 6, *supra*.

of the states when there are substantial interests which will be served by either alternative.

The Attorney General has advanced three reasons in support of the Legislature's decision in 1965 to change the date of the primary from the "seventh Tuesday before the general election," Election Law § 191(1) (a) (1964), to the "third Tuesday in June before the general election." Laws 1965, ch. 1070, effective Jan. 1, 1966. First, it was thought that voter participation would be greater if the primary was held in the spring, rather than in the fall within two months of the date when the voters must turn out again for the general election. Second, the fact that additional time in which to conduct a campaign would remain after the nominees had been selected was regarded as beneficial to both parties, and in particular to candidates campaigning against an incumbent. Finally, under the previous law it was found that the state Court of Appeals was forced to sit specially almost until Election Day in order to rule on challenges stemming from the fall primary. *See* Stenographer's Minutes of Oral Argument at 58-59. We do not find expressed or implied in the Seventeenth Amendment a policy which so clearly favors prompt vacancy elections that this court should second-guess the decision of the legislature to apply its spring primary system in the case of Senate vacancies in order to further these substantial state interests.

Plaintiffs make several contentions in attempting to establish the unconstitutionality of § 296 despite the wording of the Seventeenth Amendment, the interpretation given to the Amendment by most state legislatures, and the substantial state interests which are furthered by the law. We have examined each of these contentions with great care, mindful that no court has previously construed the Amendment's vacancy provision. In the end we find that

none of plaintiffs' arguments offset the impressive showing made in favor of the constitutionality of § 296.

Plaintiffs base their argument that § 296 exceeds the discretion conferred by the Seventeenth Amendment largely on two asserted analogies to the Amendment's vacancy provision. One analogy proceeds from the vacancy provision applicable to the House of Representatives and the other from the portion of the original Constitution superseded by the Amendment. We do not find either of these analogies persuasive.

Plaintiffs point out that the first portion of the Seventeenth Amendment's vacancy provision, stating that in the event of a vacancy the governor "shall issue writs of election to fill such vacancies," is modeled on Art. I, § 2, cl. 4 of the Constitution, which deals with vacancies in the House of Representatives. Plaintiffs argue that the House clause requires the governor to call a prompt election to fill a vacancy,[17] and conclude that the similar language in the Seventeenth Amendment must also be interpreted as mandating prompt elections.

Initially, it is not clear that Art. I, § 2, cl. 4 does require the governor to call a prompt election. Clearly he must issue a writ of election, but a few states have interpreted this clause to leave the timing of the election within the governor's discretion. See Ariz. Rev. Stat. Ann. § 16-704 (1956); Del. Code tit. 15, § 7302 (1953); N. Mex. Stat. Ann. § 3-10-30 (1953); Utah Code Ann. § 20-1-5 (1953); Wisc. Stat. Ann. § 8.50 (1967).

But assuming that special elections are required by Art. I, § 2, there are important factors which vitiate the

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[17] New York Election Law §143(13) provides that if a House vacancy arises before September twentieth of any year it shall be filled at the November election in that year.

relevance of the House vacancy provision to our problem. That provision, unlike the Seventeenth Amendment, does not authorize temporary appointments. The framers of the Amendment might logically have concluded that prompt elections were less essential for vacancies occurring in the Senate than in the House since a state will be represented in the Senate by the Governor's temporary appointee until an election is held. Furthermore, the state almost always will be represented by its other elected Senator during the existence of any vacancy, while in contrast a vacancy in the House of Representatives leave the affected district's residents completely without representation in the House until an election.

An important practical consideration also distinguishes the instance of a House vacancy from one occurring in the Senate. It is much easier for both the state government and the political parties to organize and conduct a special election in a single House district than to conduct one covering a populous state such as New York. In New York the problems of administering an election, financing a campaign, and familiarizing the electorate with the candidates are multiplied roughly 41 times in a statewide election as opposed to an election held in one of the state's 41 House districts. This fact supports the decision of the legislature not to hold special elections to fill Senate vacancies. It also provides another logical explanation for the apparent intent of the drafters of the Seventeenth Amendment to place decisions concerning the conduct of vacancy elections largely in the hands of the various state legislatures; what might be a perfectly feasible procedure in a small state such as Delaware might prove unworkable in a populous state like New York, or a vast state like Alaska.

All of these reasons persuade us that the House vacancy provision can give us no aid in construing the Seventeenth Amendment.

There is a bit more substance in plaintiffs' analogy from the clause of the Constitution which was superseded by the Seventeenth Amendment. The Constitution originally provided for the selection of Senators by the respective state legislatures. Art. I, § 3, cl. 1. Clause 2 of this section provided in these terms for the filling of vacancies:

> [I]f vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next meeting of the Legislature, which shall then fill such vacancies. Art. I, § 3, cl. 2.

At the time the Constitution was ratified it was customary for the state legislatures to meet at least once a year. *See A Collection of the Thirteen United States of North-America* (1783) (published by order of Congress); *The American's Guide* (1839) (compilation of state constitutions). *See generally* Dealey, *Growth of American State Constitutions* (1915). Consequently, in practice a "temporary" appointee named under the authority granted by Art. I, § 3, normally would hold office for no longer than one year, the maximum interval between the adjournment of the legislature and the convening of its "next Meeting." An excerpt from the debates of the Constitutional Conven-

tion indicates that this was the understanding of at least two of the Founding Fathers.[18]

The clear purpose of the Seventeenth Amendment was to give effect to the direct voice of the people in the selection of Senators. *See, e.g.,* Sen. Rep. No. 961, 61st Cong., 1st Sess. (1911). Starting from this premise, plaintiffs argue that the Amendment should be construed to prohibit delays in the holding of vacancy elections which materially exceed the approximate one year limit established under Art. I, § 3. They contend that it would be incongruous to construe an Amendment which embodies the principle of popular sovereignty as countenancing the delay of 29 months mandated by § 296 in this case, a delay more than twice as long as was the custom which plaintiffs contend prevailed before the adoption of the Amendment.

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[18]Madison's Notes on the debates report this exchange and vote concerning the provision for temporary appointments to the Senate by the state executives:

> "Mr. Wilson objected to vacancies in the Senate being supplied by the Executive of the States. It was unnecessary as the Legislatures will meet so frequently. It removes the appointment too far from the people: the Executive in most of the States being elected by the Legislatures. As he had always thought the appointment of the Executives by the Legislative department wrong, so it was still more so that the Executive should elect into the Legislative department.
>
> Mr. Randolph thought it necessary (in order) to prevent inconvenient chasms in the Senate. *In some States the Legislatures meet but once a year.* As the Senate will have more power and consist of a smaller number than the other House, vacancies there will be of more consequence. *The Executives might sagely be trusted (he thought with the appointment for so short a time.)* (Emphasis applied)
>
> * * * *
>
> On the question for striking out "vacancies shall be supplied by Executives"
>
> * * * * [Ayes —1; noes —8; divided —1.]

2 Farrand, The Records of the Federal Convention of 1787 at 231 (Madison's notes) (rev. ed. 1966).

However, our research reveals that by 1913 there was in fact no settled custom under Art. I, § 3 to limit vacancy appointments to one year. As early as 1814 an appointment is recorded which extended for approximately 19 months.[19] Toward the end of the Nineteenth Century more and more state legislatures began to meet only in alternate years, with the result that a period of almost two years could intervene between the occurrence of a Senate vacancy and the "next meeting" of the legislature. Between 1789 and 1913 there were 179 Senatorial appointments; 32 of these appointees served for more than one year and 17 of these served for at least 14 months.[20] Thus while a heavy preponderance of appointments prior to 1913 did not extend beyond one year, it cannot be said that at the time the Seventeenth Amendment was proposed an appointment for a longer period was regarded as impermissible. It is apparent that Art. I, § 3, was never interpreted to require that a special session of the legislature be convened to fill a Senate vacancy promptly after it arose. This fact provides no support for plaintiffs' contention that special elections are required to fill vacancies under the Seventeenth Amendment.

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[19]Senator Jesse Wharton of Tennessee was appointed to the Senate on March 17, 1814, and this appointment extended until October 10, 1815. Senate Manual 715.

[20]The foregoing information was abstracted from the Senate Manual, *supra* at 661-725. See also, I Haynes, The Senate of the United States 161-66 (1960), whose figures differ, but are reconcilable, in details which are not significant here. The longest appointment was that of Senator Robert Wilson of Missouri who served for 22 months, from January 17, 1862, to November 13, 1863. Senate Manual, *supra* at 694. The appointment in this case will extend for a period of slightly less than 26 months.

The Senate Manual mistakenly indicates that Alfred O. P. Nicholson of Tennessee served by appointment from December 25, 1840, to October 16, 1843. *Id.* at 715. The appointment actually lasted until February 7, 1842. See Congressional Directory, 27th Cong., 2d Sess. 22 (1841-42); Biographical Directory of the American Congress, H. Doc. No. 442, 85th Cong., 2d Sess. 1389 (1961).

Even if there had been a consistent practice prior to 1913 to limit temporary appointments to approximately one year, our ultimate decision here would be no different. There is very little evidence from the legislative history of the Seventeenth Amendment that the Congress and state legislatures which adopted it regarded the phrase "temporary appointments" as possessing a meaning derived from the practical experience under Art. I, § 3.

It is true that Representative Tucker of Virginia, who in 1892 drafted and first introduced the vacancy provision ultimately ratified as part of the Seventeenth Amendment, regarded a one year limit on the length of temporary appointments as implicit in his proposed provision.[21] In ad-

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[21] Representative Tucker provided the House with this interpretation of his vacancy provision:

> "Where vacancies occur the executive of the State shall direct writs to issue for holding the election by the people to fill the vacancies; or by law, the legislature may empower the executive to fill the same temporarily until an election can be had.
>
> Under this clause the governor must order an election to fill the vacancy that has occurred. This preserves the principle of election by the people. In some states, however, in which there are annual elections, this would be a hardship, for the vacancy would in most cases not be of long duration, and to add another State election would be imposing an unnecessary expense on the people, so that the proviso was thought to be wise by which the governor may be empowered to fill the vacancy "until the people fill the vacancy by election, as the legislature may direct."
>
> Under this provision in a State where there are biennial elections the legislature might direct that if a vacancy occurred within a year [or any other period it might fix] after the election, the vacancy should be filled by an election by the people; but if the vacancy occurred more than a year after the election the vacancy should be filled by executive appointment. This optional feature in the filling of vacancies was as far as your committee deemed it prudent to go in this direction."
>
> H.R. Rep. No. 368, 52d. Cong., 1st Sess. 5 (1892).

dition, one brief reference to the vacancy provision by Senator Bristow during the 1911 Senate debate over the Amendment[22] supports plaintiffs' position in this case. But these two isolated statements fall far short of establish-

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[22]In offering the Amendment to the Senate in 1911 Senator Bristow made these remarks:

> "The only other change that is proposed to be made in the Constitution as it is now is a provision for the filling of vacancies. The Constitution as it now reads, referring to vacancies in the Senate, says:
>
> 'And if vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'
>
> "Instead of that, I provide the following:
>
> 'When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies.'
>
> "Which is exactly the language used in providing for the filling of vacancies which occur in the House of Representatives, with the exception that the word 'of' is used in the first line for the word 'from,' which, however, makes no material difference.
>
> "Then my substitute provides that —
>
> 'The legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.'
>
> "That is practically the same provision which now exists in the case of such a vacancy. The governor of the State may appoint a Senator until the legislature elects. My amendment provides that the legislature may empower the governor of the State to appoint a Senator to fill a vacancy until the election occurs, and he is directed by this amendment to 'issue writs of election to fill such vacancies.'
>
> "That is, I use exactly the same language in directing the governor to call special elections for the election of Senators to fill vacancies that is used in the Constitution in directing him to issue writs of election to fill vacancies in the House of Representatives." 47 Cong. Rec. 1482-83 (1911).

ing that the Congress which approved the Amendment in 1912 adopted an interpretation of it contrary to New York's § 296. We do not find these bits of legislative history persuasive when weighed against the substantial state interests furthered by § 296, interests which have led most of the states to adopt similar statutes postponing vacancy elections until the next regular congressional election.

Little weight can be given to Representative Tucker's 1892 interpretation of his vacancy provision since there is no indication that the Congress which proposed the Seventeenth Amendment was even cognizant of his opinion. In the period from 1892 to 1912 many alternative vacancy provisions were placed before Congress as part of proposed amendments which failed of passage. Several of these provisions[23] specifically incorporated language concerning the timing of vacancy elections which is roughly similar to the interpretation of the Seventeenth Amendment urged on us by the Attorney General. At least one of the proposals[24] reached a result very close to the one contended for by the plaintiffs in this suit. No inference one way or the other can be drawn from the fact that none of these conflicting specific proposals was adopted.

There is no direct evidence revealing the reason for the ultimate return in 1912 to the vacancy provision contained in Tucker's original draft. However, it appears that the Tucker draft became the focus of attention not because of its vacancy provision, but because it included a

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[23] *See e.g.*, Sen. Rep. No. 916, 53d Cong., 3d Sess. 1 (1895) (setting election at "the next general election for members of the House of Representatives . . .).

[24] H.R. Rep. No. 368, 52d Cong., 1st Sess., pt. 2, p. 1 (1892) (vacancy to be filled whenever "an election can be held for the rest of the term").

clause which would have vested in the states exclusive control over the "times, places, and manner of holding elections for Senators." This repeal of the residual federal power over Senate elections contained in the original Constitution, Art. I, § 4, cl. 1, was sought by southern Senators as the price for their support of the principle of popular elections. *See* Bristow, *Resolution for the Direct Election of Senators* (1912) (Senate Doc. 666, 62nd Cong., 2d Sess.). While this clause was struck from the Amendment before its final passage, this history possibly explains the presence of the Tucker vacancy provision in the Seventeenth Amendment. It does not seem that this provision was discussed in the 1911-12 congressional debates over the Amendment with the exception of the one brief reference by Senator Bristow noted previously. *See* note 22 supra. The attention of the Senate was focused in particular on the southern attempt to achieve state control over the conduct of Senate elections and, of course, on the basic issue of popular elections.

We must conclude, therefore, that the legislative history of the Amendment sheds little light on the interpretation of the vacancy provision and does not sustain plaintiffs' contentions in this case. We read the Amendment to confer a reasonable descretion upon the states concerning the timing and manner of conducting vacancy elections. We hold that New York Election Law § 296, passed in response to the state's actual experience in these matters, is a permissible exercise of that discretion because it furthers important interests of the state and is in substantial agreement with both the original and current interpretation of the Seventeenth Amendment adopted by most state legislatures.

Our dissenting brother finds decisive in his resolution of this case such Supreme Court decisions as Baker v. Carr, 369 U.S. 186 (1962), and Brown v. Board of Education, 347 U.S. 483 (1954). These are instances, it is true, where the Supreme Court adopted an interpretation of a constitutional amendment contrary to the laws passed by many states soon after they ratified the Amendment. *See also* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). We do not assert, of course, that contemporaneous state statutes always constitute persuasive authority for the constitutional interpretation which they incorporate. But *Baker* and *Brown* are far removed from the circumstances of this case. Both interpreted the equal protection clause of the Fourteenth Amendment, a provision which restricts ("No state shall . . . deny") rather than confers ("as the legislature may direct") state discretion. In both cases, the need for innovative judicial intervention was at a maximum for the political process had consigned a minority of a state's citizens to a permanent position of inferiority with no real hope of legislative redress. *Cf.* Hobson v. Hansen, 269 F.Supp. 401, 506-08 (D.D.C. 1967). Also in this category is Williams v. Rhodes, 37 U.S.L.W. 4001 (Oct. 15, 1968), where the laws of Ohio, if left undisturbed, stood as a continuing barrier to the practical ability of minority political parties to gain a place on the state's ballot.[25]

In this case we are confronted with no fundamental imperfection in the functioning of democracy. No political party or portion of the state's citizens can claim that it is permanently disadvantaged by § 296, or that it lacks effective means of securing legislative reform if the statute is regarded as unsatisfactory. We have, rather, only the

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[25]And see note 10, *supra*.

unusual, temporary, and unfortunate combination of a tragic event and a reasonable statutory scheme.

New York's Legislature has seen fit, in the light of experience and changing conditions, to provide that senatorial vacancies be filled by an election to be held when the people are also electing their representatives to the House. The Legislature has also provided that opportunity be given to select the candidate for Senator at party primaries, and has decided to hold primaries in June, instead of September. One of the goals served by these changes in the state's law is to maximize voter participation in the nomination and election of Senators, even though as a consequence the holding of elections is somewhat delayed. Forty states have exercised their discretion under the Seventeenth Amendment in a manner consistent with one or more of the provisions of § 296.

We are aware of the importance of the right to vote in this country's general scheme of constitutional government. *See* Williams v. Rhodes, 37 U.S.L.W. 4001, 4003 (Oct. 15, 1968). We are also aware of the basic principle of federalism which requires that a federal court exercise great caution before striking down a state statute as repugnant to the Constitution. As there are substanial state interests furthered by each of these changes affected by § 296 in the timetable for filling senate vacancies by election, and as the Seventeenth Amendment has specifically given to the legislatures of the states power to regulate vacancy elections it is not for a federal court to substitute its own judgment for that of the elected representatives of the people. The lessons of history and the accumulating judgments of the states in the light of experience support our conclusion that the laws of New York do not contravene

the powers which the Constitution has given to the state legislatures, although in the tragic circumstances of Senator Kennedy's death the statutory chronology results in a delay of 29 months before the election of his successor by the people.

The complaints are dismissed.

Duplicate originals of this opinion are being filed in the Western District of New York and in the Southern District of New York.

Dated: New York, N.Y.

J. EDWARD LUMBARD
Chief Circuit Judge
JOHN O. HENDERSON
Chief District Judge

APPENDIX A

Original and Current Senate Vacancy Statutes of the Fifty States*

State	Vote on Ratification of 17th Amendment	Date of First Vacancy Statute	Election at Governor's Discretion	Special Election Within A Year	Vacancy Filled at Next Annual Election	Vacancy Filled at Next Biennial Election with No Specified Period for Nomination	Vacancy Filled at Next Biennial Election Preceded by a Specified Period of Less than 90 days	Vacancy Filled at Next Biennial Election Preceded by a Specified Period of 90 Days or more	Vacancy Filled at Next Biennial Election Preceded by a Period for the Specific Purpose of Conducting a Primary
Ala.	no vote	1915		O,C**					
Alaska	no vote	1960						O,C	
Ariz.	yes	1913				O,C			
Ark.	yes	1917		O				C	
Calif.	yes	1913				O,C			
Col.	yes	1913			O	C			
Conn.	yes	1913	O				C		
Del.	no vote	1915		O		C			

*Citations are listed in Appendix B.
**The original statute is designated by an O and the current statute is designated by a C.

State	Vote on Ratification of 17th Amendment	Date of First Vacancy Statute	Election at Governor's Discretion	Special Election Within A Year	Vacancy Filled at Next Annual Election	Vacancy Filled at Next Biennial Election with No Specified Period for Nomination	Vacancy Filled at Next Biennial Election Preceded by a Specified Period of Less than 90 days	Vacancy Filled at Next Biennial Election Preceded by a Specified Period of 90 Days or more	Vacancy Filled at Next Biennial Election Preceded by a Period for the Specific Purpose of Conducting a Primary
Fla.	no vote	1913				O,C			
Ga.	no vote	1913				O,C			
Hawaii	no vote	1961							O,C
Idaho	yes	1917					O,C		
Ill.	yes	1913				O,C			
Ind.	yes	1915				O,C			
Iowa	yes	1917				O,C			
Kansas	yes	1927				O,C			
Ky.	no vote	1914				O,C			
La.	yes	1915		O,C					
Me.	yes	1915		O					C
Md.	no vote	1914			O				C

State	Vote on Ratification of 17th Amendment	Date of First Vacancy Statute	Election at Governor's Discretion	Special Election Within A Year	Vacancy Filled at Next Annual Election	Vacancy Filled at Next Biennial Election with No Specified Period for Nomination	Vacancy Filled at Next Biennial Election Preceded by a Specified Period of Less than 90 days	Vacancy Filled at Next Biennial Election Preceded by a Specified Period of 90 Days or more	Vacancy Filled at Next Biennial Election Preceded by a Period for the Specific Purpose of Conducting a Primary
Mass.	yes	1913	O						C
Mich.	yes	1915						O,C	
Minn.	yes	1913				O			C
Miss.	no vote	1914		O,C					
Mo.*	yes	1915							
Mont.	yes	1915				O,C			
Neb.	yes	1917					O,C		
Nev.	yes	1915				O,C			
N.H.	yes	1915				O,C			
N.J.	yes	1920			O,C				

*Missouri is not classified because of the vagueness of its statute. See Appendix B for statutory language.

State	Vote on Ratification of 17th Amendment	Date of First Vacancy Statute	Election at Governor's Discretion	Special Election Within A Year	Vacancy Filled at Next Annual Election	Vacancy Filled at Next Biennial Election with No Specified Period for Nomination	Vacancy Filled at Next Biennial Election Preceded by a Specified Period of Less than 90 days	Vacancy Filled at Next Biennial Election Preceded by a Specified Period of 90 Days or more	Vacancy Filled at Next Biennial Election Preceded by a Period for the Specific Purpose of Conducting a Primary
N.M.	yes	1915					O,C		
N.Y.	yes	1913			O				C
N.C.	yes	1913					O,C		
N.D.	yes	1927				O,C			
Ohio	yes	1914						O,C	
Okla.*	yes	1913				O			
Ore.**	yes	1915					C		
Pa.	yes	1913			C				O
R.I.	no vote	1914		O			C		
S.C.	no vote	1914		O				C	

*Oklahoma repealed its vacancy statute in 1965.
**Oregon's original statute is not classified because of its vagueness. See Appendix B for statutory language.

State	Vote on Ratification of 17th Amendment	Date of First Vacancy Statute	Election at Governor's Discretion	Special Election Within A Year	Vacancy Filled at Next Annual Election	Vacancy Filled at Next Biennial Election with No Specified Period for Nomination	Vacancy Filled at Next Biennial Election Preceded by a Specified Period of Less than 90 days	Vacancy Filled at Next Biennial Election Preceded by a Specified Period of 90 Days or more	Vacancy Filled at Next Biennial Election Preceded by a Period for the Specific Purpose of Conducting a Primary
S.D.*	yes	1915				O,C			
Tenn.	yes	1913				O,C			
Texas	yes	1913		O,C					
Utah	rejected	1915				O,C			
Vt.	yes	1915		C		O			
Va.	no vote	1914			O,C				
Wash.	yes	1915		O		C			
West Va.	yes	1921				O,C			
Wisc.	yes	1913				O			C
Wyo.	yes	1913				O			C
TOTALS:			O-2 C-0	O-10 C-5	O-5=(17) C-3=(8)	O-22 C-20	O-4 C-7	O-3 C-5	O-2=(31) C-8=(40)

*The current statutory language by implication requires that a primary be held. See Appendix B.

APPENDIX B

Citations to Original and Current Senate Vacancy Statutes of the Fifty States*

All references to state constitutions affecting the first vacancy statutes are to the constitutions in effect at the time the statute involved was passed.

Alabama first provided for a special election if more than four months remained before the general election. Law 1915, No. 78, p. 364.

The present law is similar. Code tit. 41, §§ 166-7 (1958).

Alaska first provided, and now provides, for filling the vacancy at the first general election more than three months after the vacancy; however, the governor's temporary appointee may serve out any unexpired term of 29 months or less. Stat. §§ 15.40.030, 15.40.050 (1962). General elections are held in even numbered years. Stat. § 15.15.020 (1962).

Arizona first provided for filling the vacancy at the next general election. If this would have resulted in a lapse of more than six months, the governor had power to call a special election. Rev. Stat., Civ. Code tit. 12, § 2870 (Pattee 1913). General elections were held every even year. Rev. Stat., Civ. Code tit. 12, § 2866 (Pattee 1913).

The present law is identical. Rev. Stat. Ann. §§ 16-722, 16-701 (1956).

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*These citations are believed accurate, but do not include any recent amendments to vacancy laws which have not yet been incorporated in the supplements to the state statutory codes.

Arkansas first provided for holding a special election within a year of the occurrence of the vacancy. Acts 1917, No. 402, p. 1869.

Present law provides for filling the vacancy at the first general election more than four months after the vacancy. Const. Amend. XXIX, §§ 1, 4, 5 (1947). General elections are held every two years. Const. Art. III, §8.

California first required filling the vacancy at the next general election, which was held every even year. Stat. 1913, ch. 156, pp. 237-38; Cal. Polit. Code § 1041 (Deering 1915).

The present statute is identical. Elections Code Ann. §§ 25001, 2500 (Deering 1961).

Colorado first required filling the vacancy at the next general election, which was held annually. Laws 1913, ch. 79, p. 267; Const. Art. VII, § 7.

Under current law the general election is held "every even numbered year." Rev. Stat. § 49-2-1 (1964). The vacancy statute is identical to the 1913 law. Rev. Stat. 49-19-2 (1964).

Connecticut first required simply that the governor should order an election, apparently at his discretion. Pub. Acts 1913, ch. 219, pp 1839-43.

The present law requires filling the vacancy at the first state election held more than 60 days after the vacancy. Gen. Stat. Ann. § 9-211 (1967). State elections are held every even year. Gen. Stat. Ann. § 9-1 (1967).

Delaware first provided for a special election if the vacancy occurred more than one year before the next general election. Rev. Code § 1890 (1915).

The present statute provides for the vacancy to be filled at the next biennial general election. Code Ann. tit. 15, § 7321 (1953); Const. Art. V, § 1.

Florida first provided for filling the vacancy at the next general election, which was held every even year. Laws 1913, ch. 6471, pp. 277-78; Const. Art. XVIII, §9.

The present statute is identical. Stat. Ann. §§ 100.161,-.031 (1960).

Georgia first required vacancies to be filled at the "next . . . election . . . for the members of Congress." Acts 1913, No. 168, pp. 135-36.

The current statute is identical Code Ann. § 34-2403 (1962).

Hawaii has always required filling the vacancy at the first general election preceded by primary time plus sixty days. Laws 1961, ch. 123, § 1; Rev. Laws 1955 § 11-1.5 (Supp. 1965). There is a general election every even year. Const. Art. II, § 5. Primaries are held in October. Rev. Laws 1955 § 11-92.

Idaho first required filling the vacancy at the first general election more than 30 days after the vacancy. Laws 1917, ch. 27, pp. 68-69. General elections were held every even year. Compiled Stat. tit. 4, § 491 (1919).

The present statute is identical. Code § 59-910; Code § 34-201 (1947).

Illinois first required filling the vacancy at the "next election for Representatives in Congress." Laws 1913, S.B. No. 372, pp. 307-08.

The present statute is identical. Ann. Stat. ch. 46, § 25-8 (Smith-Hurd 1965).

Indiana first required filling the vacancy at the "next regular election of state officers," which apparently took place every even year. Acts 1915, ch. 4, pp. 13-14; Laws 1881, ch. 47 § 2.

The present statute is identical. Stat. Ann. §§ 29-4002, 29-4801 (Burns 1949).

Iowa first required filling the vacancy at the "next succeeding general election." Acts 1917, ch. 401, p. 430. General elections were held biennially. Compiled Code § 343 (1919).

The present statute requires that the vacancy be filled at the "next regular election at which such a vacancy can be filled." Code Ann. 69.11 (1949). Regular state elections are held biennially. *See* Code Ann. § 39.1 (1949); Const. art. 12, § 16.

Kansas first provided for filling a vacancy at the next election to the House of Representatives. Laws 1927, ch. 204, p. 258.

The present statute is identical. Stat. Ann. § 25-318 (1964).

Kentucky first provided for filling vacancies at the next Congressional election. Acts 1914, ch. 25, pp. 98-99.

The present statute is identical. Rev. Stat. § 63.200 (1959).

Louisiana first required the governor to issue a writ within ten days of the occurrence of the vacancy, the election to be held within 90 days thereafter. Acts 1914, No. 241, pp. 471-72.

The present statute is identical. Stat. Ann. §§ 18:1413; 18:1414 (1950).

Maine first required an election before the next session of Congress, or "forthwith" if Congress was in session. Acts 1915, ch. 55, pp. 35-36.

The present requirement is for the vacancy to be filled at the first general election preceded at least by the primary plus sixty days. Rev. Stat. Ann. tit. 21, § 1531 (1964). There is a state election every two years. Rev. Stat. Ann. tit. 21, § 1-14 (1964). The primary is held the third Monday in June. Rev. Stat. Ann. tit. 21 § 448 (1965).

Maryland first provided for the vacancy to be filled in the next "general election for the state assembly or for members of Congress." Laws 1914, ch. 761. In those days members of the general assembly were elected every odd year. Const. Art. III, § 7.

The present statute uses the formula next "general congressional election." Code Ann. 1967, Art. 33, § 22-1 (Supp. 1967); this section provides that the candidates for the vacaney must be selected at the primary preceding this election. Maryland holds its primary in September. Code Ann. Art. 33, § 5-2 (Supp. 1967).

Massachusetts first required the governor to issue a precept to hold an election "on the day appointed therein." Stat. 1913, ch. 835, pt. IV, § 336, p. 1059.

The present requirement is for the vacancy to be filled at the first biennial election whose primary falls more than 70 days after occurrence of the vacancy. Gen. Laws Ann. ch. 54, § 139 (1964). Massachusetts holds its primary on the seventh Tuesday preceding the election. Gen. Laws Ann. ch. 53, § 28 (1964).

Michigan first required the vacancy to be filled at the first general election more than 120 days after the occurrence of the vacancy. Pub. Acts 1915, No. 156, pp. 261-62.

There was a general election every even year. Pub. Acts 1913, No. 56.

The current provisions are identical. Compiled Laws Ann. § 168.105; 168.3 (1967).

Minnesota first provided for the vacancy to be filled at the next general election, which took place every two years. Laws 1913, ch. 520, § 8, pp. 756-58; Gen. Stat. 1913, ch. 6, § 298.

The present requirement is for the vacancy to be filled at the next biennial state election whose primary falls at least 60 days after occurrence of the vacancy. Stat. Ann. § 203.56 (1962). The primary is held in September. Stat. Ann. § 201.01 (1962).

Mississippi first required a special election within 90 days unless there was a general election the same year, or unless there was less than one year left in the term. Laws 1914, ch. 148, § 3, pp. 192-93.

The current statute is identical. Code Ann. § 3308-09 (1956).

Missouri now provides, and has always provided, for executive appointment "until a successor shall have been duly elected and qualified according to law." Ann. Stat. § 105.040 (1966); Laws 1915, S. B. 351, p. 280.

Montana first required a vacancy to be filled at the next general election, which was held every even year. Laws 1915, ch. 126, pp. 281-82; Rev. Code ch. 44, § 531 (1921).

The current statute is identical. Rev. Code §§ 23-2201, 23-2101 (1967).

Nebraska first required the vacancy to be filled at the first election for state officers more than 40 days after

it occurred, and held such elections in even years. Laws 1917, ch. 39, pp. 117-118; Laws 1913 ch. 149.

The present statute is identical. Rev. Stat. §§ 32-1042, 32-105 (1960).

Nevada first required vacancies to be filled at the next general election, which was held every two years. Laws 1915, ch. 65 pp. 83-84; Acts. 1873, ch. 121.

The present statute is identical. Rev. Stat. § 304.030 (1967).

New Hampshire first provided for the vacancy to be filled at the next general election, which was held every even year. Laws 1915, ch. 29, p. 32; Laws 1909, ch. 153.1.

The present statute is identical. Rev. Stat. Ann. § 63.3 (1955).

New Jersey first required the vacancy to be filled at the next general election which was more than 30 days after the occurrence of the vacancy, but the governor had discretion to call a special election earlier. There was a general election every year. Laws 1920, ch. 349.

The present statutes are identical. Stat. Ann. §§ 19:3-26, 19:1-1 (1964).

New Mexico first required the vacancy to be filled at the first general election at least thirty days after the occurrence of the vacancy. Laws 1913, ch. 114. General elections were held every even year. Const. Art. XX, § 6.

The present statutes are identical. Gen. Stat. Ann. § 3-10-19 (1954).

New York first provided that the vacancy be filled at the first annual general election held 30 or more days after the creation of the vacancy. Laws 1913, ch. 822.

The current law provides that the vacancy be filled in the first even-numbered year in which 60 days or more intervene between the creation of the vacancy and the June primary. Election Law §§ 296 (1964), 191(1)(a) (Supp. 1968).

North Carolina first required the election to be held at the first general election more than 30 days after the vacancy. Laws 1913, ch. 114, p. 206. These elections were held every even year. Laws 1901, ch. 18, § 3.

The present statute requires the vacancy to be filled at the next election for members of the general assembly held more than 30 days after the vacancy occurs. The general assembly is elected in even-numbered years. Gen. Stat. §§ 163-12,-1 (Supp. 1967).

North Dakota first provided for the vacancy to be filled "at the next state wide election, whether June primary or general election." Laws 1927, ch. 18, pp. 175-76. In every even year there was a primary in June and a general election in November. Laws 1892, H.B. No. 1, § 1.

At present the requirement is for filling the vacancy at the next state-wide election. Century Code Ann. § 16-07-07 (1960). There is still an election in every even-numbered year. Century Code Ann. § 16-06-01 (1960).

Ohio first required the vacancy to be filled at the next state election more than 180 days after its occurrence. Laws 1914, H. B. No. 3, p. 8. These elections were held in even numbered years. Laws 1913, p. 23.

The present statutes are essentially similar. Rev. Code Ann. §§ 3521.02, 3501.01(c) (Baldwin 1968).

Oklahoma first required the vacancy to be filled at the next primary and general election. Laws 1915, ch. 49, pp.

69-70. These elections were held every two years. Laws 1907-8, S. B. No. 23.

This statute was repealed by Laws 1965, ch. 116, § 4.

Oregon first provided that the governor's appointee shall serve "until a United States Senator is regularly elected and qualified." Code § 236.130; Laws 1915, ch. 49, p. 59.

Today the vacancy is to be filled at the next general election held more than 20 days after the vacancy occurs. Const. Art. V, § 16 (eff. 1926). General elections are held in even-numbered years. Rev. Stat. § 250.010 (1963).

Pennsylvania first provided for filling the vacancy at the first general election whose primary occurred more than 60 days after the vacancy. Laws 1913, No. 454. There was a general election every even year. Const. Art. VIII, §. 2.

The present requirement is for the vacancy to be filled "at the next general or municipal election at least 90 days after the happening of such vacancy." Stat. Ann. tit. 25, § 2776. There is a general election every even-numbered year and a municipal election every odd-numbered year. Stat. Ann. tit. 25, §§ 2751, 2752.

Rhode Island first required a special election "at as early a date as will admit of compliance with the provisions of law in relation to such elections." Laws 1914, ch. 1048, § 6.

The present statutes provide for filling the seat at the first general election at least 70 days after the vacancy, and for holding general elections in even-numbered years. Gen. Laws §§ 17-4-9, 17-1-2(b) (1967 Supp.).

South Carolina first provided for a special election within 90 days. Laws 1914, ch. 337.

The present statutes provide for general elections in even-numbered years, and require any vacancy to be filled at the first general election more than 100 days after the vacancy. Code Ann. §§ 23-552, 23-391 (1962).

South Dakota first provided for filling vacancies at the "next general election," and required these to be held every even-numbered year. Laws 1915, ch. 182; Const. Art. VII, § 4.

The present provision is for filling vacancies at the next general election which is preceded by sufficient time to allow compliance with the regular nominating procedures, which include a primary. Code § 16.0602 (1939). General elections are still held every even-numbered year. Code § 16.0601 (1939). The primary is held the first Tuesday in June. § 16.0202 (Supp. 1960).

Tennessee first required the vacancy to be filled at the "next regular biennial election." Acts 1913, ch. 8, § 3.

The current statute is identical. Code Ann. § 2-608 (1955).

Texas first required a special election within 90 days unless the vacancy occurred within eight months of a general election. Acts 1913, ch. 39.

The current statute is essentially similar. Stat. Ann. Election Code, Art. 12.02 (1967).

Utah first required a choice at the "next regular election to be held in Utah for the Federal House of Representatives." Laws 1915, ch. 48.

The present requirement is for the choice to be made at the next general election, which must be held in an even-numbered year. Code Ann. §§ 20-1-6, 20-1-1 (1953).

Vermont first required the vacancy to be filled at the next general election, which took place every even-numbered year. Acts 1915, No. 7; Const. Arts. 35, 36.

The present statute requires the governor to call a special election, but also provides that if the vacancy occurs in a general election year before the general election, it shall be filled then. Stat. Ann. tit. 17, § 1501 (1959).

Virginia has always provided for filling vacancies at the next "November election" and for holding these elections annually. Code §§ 24-2, 24-136 (1964); Laws 1914, ch. 150; Laws 1908, ch. 28.

Washington first provided only that "the Governor shall issue a writ of election fixing the time for such election not less than 25 days after the issuance thereof." Laws 1915, ch. 60, p. 232. We classify this statute as requiring a special election within one year.

The present statutes require the vacancy to be filled at the next state general election, which is held every even-numbered year. Rev. Code Ann. § 29:68.070 (1965); Const. Art. VI, § 8.

West Virginia first provided for filling the vacancy at the next general election, and for holding those elections every year. Laws 1921, ch. 101, § 1; Laws 1891, ch. 89.

Present statutes allow appointment for the balance of the term if that is less than thirty months, and otherwise until the next general election, which is held in even-numbered years. Code §§ 3-10-3, 3-1-31 (Supp. 1968).

Wisconsin first provided for the vacancy to be filled at the next general election if the governor did not call a special election before then. Laws 1913, ch. 634, § 940.

General elections were held every two years. Const. Art. VI, § 6.

The current statutes require the vacancy to be filled in the next biennial general election year in which the vacancy occurs at least 60 days before the July primary. Code § 17.18 (Supp. 1968).

Wyoming first provided for filling the vacancy at the next general election, which was held in even years. Laws 1913, ch. 19, § 1; Const. Art. VI, § 18.

Current law provides for filling the vacancy at the first general election whose primary occurs at least 40 days after the vacancy. Stat. § 22-118.188 (Supp. 1967). General elections are held in even-numbered years. Stat. § 22-118.3 (Supp. 1967). Primaries are held in August. Stat. § 22-118.15 (Supp. 1967).

DISSENTING OPINION OF HON. MARVIN E. FRANKEL, UNITED STATES DISTRICT JUDGE IN THE SOUTHERN DISTRICT OF NEW YORK

United States District Court

Western District of New York

JOSEPH A. VALENTI, 6 Boughton Avenue, Pittsford, New York, for himself and for all persons similarly situated,

Plaintiff,

against

NELSON A. ROCKEFELLER, Governor of the State of New York, Executive Mansion, Albany, New York; and JOHN P. LOMENZO, Secretary of State of the State of New York, State Capitol Building, Albany, New York,

Defendants.

W.D.N.Y. Civil Action No. 1968-224

FRANKEL, D. J., dissenting:

The loud, clear, and supreme command of the Seventeenth Amendment is that Senators are to be "elected by the people * * *." Though not all change is progress, none of us doubts that this expansion of popular sovereignty was a forward step for a cherished national ideal. But the office of Senator is too important to be left vacant even for brief periods. And so, as a stopgap, in a proviso, the

Amendment allows Governors to make "temporary appointments until the people fill the vacancies by election as the legislature may direct." According to the defendants, with the approval of my respected colleagues on this court, that proviso is entitled to so expansive a role that nearly half the senatorial term may be occupied by an appointee rather than by a choice of the people.

This is an unprecedented extension of the "temporary" appointive power. It is sanctioned today in what appears to be the first judicial scrutiny of the proviso in question. The result, I belief, is an error. It is said to rest, initially, upon what my bretheren perceive as "clear language" — namely, the five words ("as the legislature may direct") at the end of the proviso — but the language had a "clear" meaning of a quite different sort to those who wrote it. Bloating that tag-end phrase, the majority's construction follows from an almost total disregard of the Amendment's primary terms and vital sense. Indeed, the majority opinion (like the brief of the State's Attorney General) does not even quote the positive first paragraph of the Seventeenth Amendment, but sets out only the second paragraph, concerning vacancies, in a kind of artificial isolation which may help to account for what I believe to be a plainly misplaced emphasis.

The majority's result is also thought to find support in the unconsidered, untested enactments of some state legislatures, none of which appeared, even on their surface, to go as far as New York's officials now claim a right to go in blocking the popular will. But perhaps the most remarkable thing of all is that the revered principle of government "by the people," so clearly at the heart of the Seventeenth Amendment, is today subordinated when there is no faint echo of any genuinely countervailing interest,

state or federal, to be furthered in the process. I say this in full awareness that the majority opinion refers repeatedly to "substantial state interests" as supposed justification for the way New York's authorities have dealt with the Seventeenth Amendment. In the end, however, this array of asserted "interests" — ranging, as I shall explain below, from trivial to merely debatable — amounts to nothing that should be thought to "balance" into a 30-month paralysis the sovereignty of the people proclaimed by the Amendment.

I.

The most powerful, and probably sufficient, arguments against defendants' position are found in the words of the Seventeenth Amendment, in sound and familiar guides to their construction, in the arrangement of those words, and in their constitutional setting, which includes, of course, elementary principles of representative government familiar to all of us. Postponing those central subjects, I note that useful light and perspective are afforded by referring first to the pertinent provisions of the Constitution as they were originally written and as they stood just prior to the changes wrought by the Seventeenth Amendment.

Article I, section 3, clause 1, provided that the Senators from each State were to be "chosen by the legislature thereof * * *." The next succeeding clause, in the portion most pertinent here, said:

> "if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointment until the next meeting of the legislature, which shall then fill such vacancies."

One or two features of that language and its setting are notable for our purposes:

(1) The power of executive appointment was to arise only during a recess of the legislature, and appointments under that authority were not to survive the next session of the legislature.

(2) State legislatures as the Founders knew them met annually.[1] Thus, an executive appointee to the Senate could practically never have been expected to hold office for more than a year before the primary method of selection, by the legislature, was once again enforced.[2] And in fact no such appointee up to 1814 ever held office for longer than a year.[3] In the years after adoption of the Constitution, however, state legislatures came increasingly to meet biennially, resulting in some drift (apparently never tested or debated) away from the original understanding.[4]

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[1]See *A Collection of the Constitutions of the Thirteen United States of North-America,* published by Order of Congress (1783); *The American's Guide* (1839) (compilation of state constitutions). See generally, Dealey, *Growth of American State Constitutions* (1915); Morey, *The First State Constitutions, IV Annals of the American Academy of Political and Social Science* 201, 220 (1893); Nevins, *American States During and After the Revolution* 1775-1789 at 165-68 (1924).

[2]Even if the legislature waited until the end of its session to choose a successor, the appointee, having been chosen *after the end* of the preceding session, would in all likelihood have served less than a year.

[3]The first departure was the appointment of Senator Jesse Wharton of Tennessee to a term from March 17, 1814 to October 10, 1815. Senate Manual, S. Doc. No. 1., 90th Cong., 1st Sess. 715 (1967) (hereinafter "Senate Manual").

[4]As the majority notes, there were 179 appointees who served between 1789 and 1913, when the Seventeenth Amendment became effective. Of these 32 served for over a year, and only 17 served for over 14 months. The longest appointment was that of Senator Robert Wilson of Missouri who served for 22 months, from January 17, 1862, to November 13, 1863. Senate Manual, *supra* at 694.

Thus, when the Seventeenth Amendment came to be adopted — substituting choice by the people for choice by the legislature — it had been familiar for well over 100 years that the preferred mode of selection under the Constitution was to be dominant over and confine the interim power of appointment. Our problem may fairly be stated— and in some measurable degree resolved — by asking whether the Amendment can be read to have allowed substantially longer appointments to postpone the will of the people than had been intended to postpone a legislative designation.

Further illumination from the original Constitution is found in its provisions respecting the House of Representatives. Members of the House were, of course, elected "by the people" from the beginning (Article I, section 2, clause 1) for two-year terms. There was no provision for interim executive appointments. Instead, clause 4 of the same section provided, as it still does:

> "When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies."

Again, it seems useful to note specifically some pertinent thoughts generated by this cognate provision:

(1) Though House terms were never to last more than two years, the state executive was and is directed to (he "shall") order elections to fill interim vacancies.

(2) The mandatory language of the Seventeenth Amendment, saying the executive "shall issue writs of election to fill such vacancies," duplicates the language applicable from the beginning to the House.

(3) Neither the governor nor the people are ever in "recess," and it appears that no need was perceived to have recess appointments during the presumably brief period required to fill the vacancy by popular election.

(4) Since each state was to have only two Senators, and each was to represent the State as a whole, a Senate vacancy would in most cases effect a greater proportionate loss of representation than would a vacancy in the House. See 2 Farrand, *The Records of the Federal Constitution of 1787* at 231 (Madison's notes) and 242 (King's notes) (rev. ed. 1966). Cf. H.R. Rep. No. 88, 56th Cong., 1st Sess. 4-5 (1900). Accordingly, by providing for executive appointments, the framers undertook to ensure that there would be no Senate vacancies even during the state legislative recesses of less than a year.

Apart from the details, the most striking aspect of the provisions respecting the House was that vacancies which could never have lasted for over two years were to be filled by popular election. The obvious, and obviously workable, premise was that effective elections could be organized and completed with sufficient speed so that it would be worthwhile to fill such relatively brief gaps in this way.

Both the original provision respecting temporary appointments for Senate vacancies and the House provision for elections to fill vacancies were combined in significant fashion when the Seventeenth Amendment was drafted. The constitutional language relating to the House was carried over without change in its mandate requiring the ordering of elections by the state executive. The original

language relating to the Senate — and providing, as we have seen, for vacancies between the annual meetings of the original state legislatures — was likewise adapted to the new scheme of popular elections. The amended draft, ultimately to become the Seventeenth Amendment, was offered by Senator Bristow. Speaking with authority as author of the language in question and as a key proponent of the Amendment, Senator Bristow supplied a cogent, squarely apposite, and never questioned account of the drafting enterprise. His words, described by my senior colleagues as "one brief reference to the vacancy provision * * * [which] supports plaintiffs' position in this case," bear reproduction here:

> "The only other change that is proposed to be made in the Constitution as it is now is a provision for the filling of vacancies. The Constitution as it now reads, referring to vacancies in the Senate, says:
>
> " 'And if vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.'
>
> "Instead of that, I provide the following:
>
> " 'When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies.'
>
> "Which is exactly the language used in providing for the filling of vacancies which occur in the House of Representatives, with the exception that the word 'of' is used in the first line for the word 'from,' which, however, makes no material difference.
>
> "Then my substitute provides that —
>
> " 'The legislature of any State may empower the executive thereof to make temporary appointments

> until the people fill the vacancies by election as the legislature may direct.'
>
> "That is practically the same provision which now exists in the case of such a vacancy. The governor of the State may appoint a Senator until the legislature elects. My amendment provides that the legislature may empower the governor of the State to appoint a Senator to fill a vacancy until the election occurs, and he is directed by this amendment to 'issue writs of election to fill such vacancies.,
>
> "That is, I use exactly the same language in directing the governor to call special elections for the election of Senators to fill vacancies that is used in the Constitution in directing him to issue writs of election to fill vacancies in the House of Representatives." 47 Cong. Rec. 1482-83 (1911).

That "one brief reference" does not stand alone. Like the final version of the Amendment, its precursors characteristically took from the Constitution the words relating to House vacancies (in Article I, section 2, clause 4) which instruct the state executive to "issue writs of election to fill such vacancies." See, e.g., H. Res. 90, H.R. Rep. No. 368, 52d Cong., 1st Sess. 1 (1892); H. Res. 20, H.R. Rep. No. 944, 53d Cong., 2d Sess. 1 (1894); H. J. Res. 28, H.R. Rep. No. 88, 56th Cong., 1st Sess., pt. 2, p. 2 (1900). Then, adapting the provision in Article I, section 3, clause 2, for "temporary appointments" between sessions of the state legislature, the proposed versions provided for such appointments until the next general election for "members of the House of Representatives in Congress"[5] or merely until "the time of the next general election."[6]

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[5]S. Rep. No. 794, 52d Cong., 1st Sess. 2(1892); S. Rep. No. 530, 54th Cong., 1st Sess. 11 (1896); H. R. Rep. No. 88, 56th Cong., 1st Sess., pt. 2, p. 2 (1900).

[6]S. Rep. No. 916, 53d Cong., 3d Sess. 1 (1895); H. R. Rep. No. 994, 54th Cong., 1st Sess. 1 (1896).

Of greatest interest, however, is the language sponsored and explained in 1892 by Representative Henry St. George Tucker, who proposed an amendment for the popular election of Senators with a vacancy provision identical to the ultimately ratified text, except for the unexplained omission of a comma in the latter.[7] Explaining the proposed language, Congressman Tucker's Report, H. R. Rep. No. 368, 52d Cong., 1st Sess. 4-5 (1892), said:

> "Where vacancies occur the executive of the State shall direct writs to issue for holding the election by the people to fill the vacancies; or, by law, the legislature may empower the executive to fill the same temporarily until an election can be had.
>
> "Under this clause the governor must order an election to fill the vacancy that has occurred. This preserves the principle of election by the people. In some States, however, in which there are annual elections, this would be a hardship, for the vacancy would in most cases not be of long duration, and to add another State election would be imposing an unnecessary expense on the people, so that the proviso was thought to be wise by which the governor may be empowered to fill the vacancy 'until the people fill the vacancy by election, as the legislature may direct.'
>
> "Under this provision in a State where there are biennial elections the legislature might direct that if a vacancy occurred within a year [or any other period it might fix] after the election, the vacancy should be filled by an election by the people; but if the vacancy occurred more than a year after the election the vacancy should be filled by executive appointment. This optional feature in the filling of vacancies was as far as your committee deemed it prudent to go in this direction."

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[7] See majority opinion note 7 and text. The lost comma has been a subject of little discussion in either the briefs or the prevailing opinion. I follow those tasteful examples.

That predecessor explanation, undoubtedly well known to the later legislative leaders who copied the Tucker proposal with which it went,[8] was a clearly sensible and apt description of what the language was meant to accomplish. No other or different account was given for the substantially identical language later passed and ratified. Without pretending to use jeweler's scales, we must surely acknowledge that *some* weight attaches to the quoted words. And this item, like many others, is opposed to defendant's position.

It fits perfectly with the language and surroundings of the vacancy provision to say, as Congressman Tucker did, that the state legislature was authorized to "empower the executive to fill the same temporarily until an election can be had." Not, as defendants argue, until the end of any time short of six years which the state legislature might choose to deem "temporary." More specifically, Mr. Tucker, properly emphasizing the controlling "principle of election by the people," but yielding to the countervailing "expense on the people" of repeated elections *in a single year*, explained the "optional feature" as permitting appointments for *no more* than a year. And that, of course, recalled and adapted the original understanding — confining the appointive power as narrowly against the people as it had been confined against the state legislature.

Other items of pertinent history point in the same direction. Among the Founders themselves, the device of gubernatorial appointment was deprecated as a somewhat dubious expedient; there was skepticism as to whether

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[8]Representative Tucker's authorship was expressly acknowledged on the Senate floor during the debates leading directly to the Seventeenth Amendment. 46 Cong. Rec. 2940 (1911).

"executives might be safely trusted" with such power, which, one member observed, would remove "the appointment too far from the people * * *." Such doubts appear to have been overridden only "in order to prevent inconvenient chasms in the Senate." 2 Farrand, *The Records of the Federal Convention of 1787* at 231 (Madison's Notes) (rev. ed. 1966).

In the event, as we know, balancing *legislative* power against the executive, the Founders apparently deemed it tolerable to accept appointments likely to last less than a year precisely because they were to be effective only "for so short a time." *Ibid.*

Preserving this narrow view of the appointing power, the Senate itself, in the years before the passage of the Seventeenth Amendment, consistently refused to seat an appointee of the governor if a state legislative term intervened between the occurrence of the vacancy and the appointment, or if the state legislature convened after the appointment and failed to elect. 1 Haynes, *The Senate of the United States* 161-63 (1960); Senate Election, Expulsion and Censure Cases from 1789 to 1960, S. Doc. No. 71, 87th Cong., 2d Sess. 2, 7, 19, 20 (1962).

While the documentation is by no means conclusive, there is substantial evidence to indicate that those who pressed for the Seventeenth Amendment were familiar with that history and that attitude. Thus, in reports recommending close predecessor counterparts of what became the Amendment, Congressman Corliss, in 1900 and 1902, observed:

> "Never in the history of the Senate, it can be creditably said, has that body seated a person seeking admission by appointment from the governor after the

> legislature of the state had failed to elect." H.R. Rep. No. 88, 56th Cong., 1st Sess. 5 (1900).[9]

The same reports reflected a grudging and narrowly confined view of the power to be given the Governor under the new provisions for popular elections. They observed that in the existing scheme of legislative designation of Senators,

> " 'the governor of a State and his friends, by cabal, intrigue, and maneuver may so arrange that the legislature will decide not to elect, or would fail to elect, in order that the governor might gather to himself the power to fill the vacancy.' " H. R. Rep. No. 88, *supra* at 6; H.R. Rep. No. 125, *supra* at 6.

They expressed a determination to thwart expansions of the gubernatorial power over vacancies and to make it "impossible to defeat the will of the people * * *." *Ibid.*

While the quoted words were written in 1900, and again in 1902, they reflected sentiments that appear to have remained active in the final stages leading to the Seventeenth Amendment. Those earlier reports were cited in the report of a decade later which brought the amending enterprise to fruition. See S. Rep. No. 961, 61st Cong. 3d Sess. 12, 13 (1911), which cited the above reports, and the substance of which was in turn copied in H.R. Rep. No. 2, 62d Cong., 1st Sess. 1 (1911). What may be far more significant, the language carried over and enacted from drafts many years old is exactly consistent both with the quoted explanations and the revealing history of senatorial appointments prior to the Seventeenth Amendment.

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[9]H.R. Rep. No. 125, 57th Cong., 1st Sess. 5 (1902) repeats the quoted words verbatim, except for a change in the eleventh word to "credibly."

The historical materials I have mentioned are of special interest when it is agreed, as it must be, that the Constitution supplies no arithmetical or dictionary solution for our problem. It seems clear, notwithstanding the extreme contrary view to which the logic of defendants' position has somehow driven them, that the provision in the Seventeenth Amendment for "temporary appointments," pending the preferred course of choice by popular election, could not faithfully be read to allow appointments for anything approaching the full six years in the case of a vacancy occurring early in the term.[10] Given that premise (upon which the three members of this court are agreed), the need is for a constitutional judgment, having regard to the context and paramount purpose of the text, declaring the point (or at least the closely defined "neighborhood") where the line limiting "temporary" must be drawn. And so it is pertinent, if not in itself decisive, that the long pre-existing environment in which the Amendment was placed (1) had made familiar a pattern of executive appointments in the Senate averaging well under a year, (2) had been constructed with such a time limitation clearly in view, and (3) included a provision for special elections to fill House vacancies for unexpired terms inevitably shorter than two years in duration.

II.

I arrive, finally, at what is center stage in this case, the text of the Seventeenth Amendment. The two permanently operative paragraphs read as follows:

> "The Senate of the United States shall be composed of two Senators from each State, elected by

[10] Invoking the dictionary as a prime aid, and citing an array of cases from remote legal universes, defendants say (Memorandum, p. 12) "it is apparent that an appointment for two years and six months would be a 'temporary appointment' since it is less than a full six year term."

> the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
>
> "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."[11]

The vital substance of the change this Amendment wrought was its provisions that the Senators of a State should be "elected by the people thereof * * *." Where the occasion arises to say what it is about, capturing its essence, we are likely to observe that "when Senators are chosen, the Seventeenth Amendment states the choice must be made 'by the people.' " *Gray v. Sanders,* 372 U.S. 368, 380 (1963). The Amendment marked a new and higher stage in the unfolding "concept of 'we the people' under the Constitution * * *." *Id.* at 379-80. It was tendered by the Congress for ratification after the pressure for such an expansion of popular sovereignty had mounted to the point of irresistibility. 1 Haynes, *The Senate of the United States* 81-106 (1960); S. Rep. No. 961, 61st Cong., 3d Sess. 14-15 (1911).

It is vital to dwell upon and to apprehend fully that this broadening by the Seventeenth Amendment of the area for "the exercise by the people of their choice," *United States v. Classic,* 313 U.S. 299, 317 (1941), implements one of the enduring and "great purposes which were intended to be

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[11]The third and final paragraph, serving a temporary purpose long since completed, says:

> "This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

achieved by the Constitution as a continuing instrument of government." *Id.* at 316.[12] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964); see

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[12]S. Rep. No. 961, submitted by Senator Borah, one of those in the vanguard fighting for the Amendment, reported favorably on S.J. Res. 134, an immediate predecessor and close counterpart of the Resolution passed in the following year. This document described in specific and cogent terms the process of "maintaining" the fundamental principles of the Constitution by the kind of adaptive change the Seventeenth Amendment came to effect (*id.* pp. 3-4):

> "It is proper to take into consideration the condition of affairs with reference to popular voting at the time of the formation of the Constitution. Very few of the States gave to their citizens the unqualified right to vote and very few allowed the people the right to elect any considerable number of officials. Most of the offices in the State were filled by appointment, some by the legislature, some by the chief executive. For a number of years, the legislature had been practically a gathering of the people, that is to say, the body through which they acted in sundry matters not strictly legislative. A vast change has taken place since then. At the present time practically all of the officers from precinct officer to the President are elected, with certain exceptions as to the judiciary. The President, in view of the function now performed by the electors, is in reality elected by popular vote. Manhood suffrage has everywhere become general and practically unqualified.
>
> "We do not cite these historic facts for the purpose of in any way seeking to impeach or criticize the remarkable men who framed our Constitution. In the science of government none have ever excelled the men who gathered at Philadelphia for the great task of 1787. The general principles of government which they announced and incorporated into the charter few indeed would challenge. But in the mechanism or machinery by which those general principles are applied from decade to decade, or century to century, there may arise the necessity of change. The economic, social, and industrial changes which have taken place since the present method of electing Senators was established seem to require a reconsideration of the method; not for the purpose of changing the fundamental principles of our Government, but for the purpose of maintaining the very principles which the fathers sought to establish."

also *Reynolds* v. *Sims,* 377 U.S. 533, 555, 561-62 (1964). And so where this kind of elemental right is expanded, it is important to keep in sharp focus that it is the *right* which is "of the essence" and that "restrictions" or qualifications fall naturally into a straitened and subordinate place. See *Reynolds* v. *Sims,* 377 U.S. 533, 555, 561-62 (1964). We should be guided by this as a pervasive axiom in the study of the problem before us.

Following the primary mandate for popular election in its first paragraph, the second paragraph of the Amendment begins with the same major and preferred procedure as the means of filling vacancies, namely, by "writs of election * * *." It is only thereafter that the expedient here in question is permitted, as a proviso, in the authorization saying "That the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." The two clauses together end as they begin, with the reasserted power of "the people * * * by election" to terminate the temporary appointment and install their choice.

So we have in sum a six-year term to be filled by the people; vacancies to be similarly filled; and a power to make "temporary appointments" only until state officials, sworn to obey the Federal Constitution, can make suitable arrangements for the popular will to be expressed. It is, as has been acknowledged, not possible to find in the text alone an explicit prohibition against a "temporary appointment" extending for almost half the six-year term. What is less possible, however, is to accept that the words, and the order of words, comprising the Seventeenth Amendment can tolerably be read to allow such a result.

Undertaking, as we must, to expound a Constitution, we could not readily find complete answers in interpretative "canons" any more than in the text alone. But a pertinent guide to construction helps to explicate and reinforce what follows from weighing the relative values at stake in the case. New York's Election Law §296 would have to be justified, if it could be, in a proviso — the kind of narrow, incidental, restricted item of legislative grammar which is always presumptively entitled only to a strict construction. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Comm.*, 286 U.S. 299, 311-12 (1932); *United States* v. *McElvain*, 272 U.S. 633, 638-39 (1926); *Ryan* v. *Carter*, 93 U.S. 78, 83-84 (1876); *The Dollar Savings Bank* v. *United States*, 86 U.S. 227, 235-36 (1873); *United States* v. *Dickson*, 40 U.S. 91, 106-107 (1841). The interim function of the appointing power was thus expressed in the traditional form suited to its subordinate status.

Another guide to construction is even more specifically and substantively pertinent. Long before the passage of the Seventeenth Amendment, the state courts had repeatedly interpreted their constitutional and statutory provisions governing temporary appointments to elective offices to permit an appointee to remain in office "only until the people who elected his predecessor have the first opportunity to fill the office with a person of their own choice * * *." *State ex rel. McGowan v. Sedgwick*, 46 Mont. 187, 127 P. 94, 95-96 (1912). See also, e.g., *People* v. *Tilton*, 37 Cal. 614, 621 (1869); *State ex rel. Weeks* v. *Gamble*, 13 Fla. 9, 14-15, 16 (1870); *McCreary* v. *Williams*, 153 Ky. 49, 52-53, 154 S.W. 417, 419-20 (1913); *Attorney General ex rel. Lawrence* v. *Trombly*, 89 Mich. 50, 56, 57, 50 N.W. 744, 746, 747 (1891); *State ex rel. Smallwood* v. *Windom*, 131 Minn. 401, 155 N.W. 629, 632 (1915); *State ex rel. Barrett* v. *McClure*, 299 Mo. 688, 253 S.W. 743, 744 (1923); *State ex rel.*

Castle v. *Schroeder,* 79 Neb. 759, 760-61, 113 N.W. 192, 193 (1907); *People ex rel. Kehoe* v. *Fitchie,* 76 Hun. 80, 28 N.Y.S. 600 (2d Dep't 1894); *Rodwell* v. *Rowland,* 137 N.C. 617, 623, 50 S.E. 319, 321 (1905); *State ex rel. Harsha* v. *Troxel,* 125 Ohio St. 235, 181 N.E. 16, 17 (1932); *Oregon* v. *Johns,* 3 Oregon 533, 535 (1869); *Commonwealth ex rel. Broom* v. *Hanley,* 9 Pa. 513, 519 (1848); *State ex rel. Rearick* v. *Lyman County,* 34 S.D. 256, 145 N.W. 548 (1914); 132 A.L.R. 574, 576 (1941) (citing cases). Cf. *State ex rel. Lanier* v. *Hall,* 74 N.D. 426, 23 N.W. 2d 44, 48 (1946).

Even on a rather general approach to problems of construction we should be disposed to find the same premise in the Seventeenth Amendment — upon the sound presumption "favoring the retention of long-established and familiar principles * * * ." *Isbrandtsen Co.* v. *Johnson,* 343 U.S. 779, 783 (1952); *S.E.C.* v. *Capital Gains Bureau,* 375 U.S. 180, 194-95 (1963); *Ex Parte Grossman,* 267 U.S. 87, 108-109 (1925). But there is far more compelling and focused pressure behind such a conclusion. What the line of state cases reflects is a unified body of axioms for representative government — all leading to the stand that "the emergency of the public business" is "the only excuse for the appointment of any officer made elective under the law * * *." *Todd* v. *Johnson,* 79 Ky. 548, 36 S.W. 987, 989 (1896). That position, required by "general principles of democracy," *State ex rel. Sullivan v. Moore,* 49 Ariz. 51, 64 P. 2d 809, 816 (1937), is overwhelmingly more significant than defendants' resort to the dictionary for definitions of "temporary."

An indication of a similar sort is found in the Constitution of New York State itself, which provides that an appointee filling a vacancy in an elective office may serve no more than approximately a year — or, to be ab-

solutely precise, a conceivable maximum of just under fourteen months.[13] This applies, defendants remind us, only to *state* offices, and they are certainly right about that. What is less clearly right is the suggestion that the New York constitutional provision is therefore of no moment for our problem. It is at a minimum a further illustration and confirmation of how the electoral power of the people should be weighed against an executive power to appoint where the overall design (in New York or elsewhere) is to be a "republican form of government."

III.

The majority decision for defendants rests upon three main grounds: (1) "clear language" found in the Seventeenth Amendment; (2) "contemporaneous" and later "constructions" of the Amendment in the form of unexplained and untested state statutes; and (3) "substantial state interests" said by the court to underlie N.Y. Election Law §296. Having brooded respectfully over these things, I am forced to say they seem, singly and collectively, quite insufficient to validate the postponement for 2½ years of the popular election required by the Seventeenth Amendment.

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[13] "[I]n case of elective officers, no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy." N.Y. Const., Art. XIII, §3. The "political year" commences in New York on January 1. *Id.*, §4.

In an effort at what may be excessive precision, I have indicated that the quoted provisions might permit an appointee to serve for nearly fourteen months. This would be the case where a vacancy occurred immediately following an annual November election, permitting the appointee, if he were designated promptly, to serve until a year after the succeeding January 1.

1. The textual argument is stated firmly, but not dwelt upon, in the majority opinion. It need not be labored in this dissent.

The Seventeenth Amendment used "clear language," the majority says, in the five words at the end of the vacancy proviso, italicized here:

> "That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election *as the legislature may direct.*"

Rejecting plaintiffs' "subtle reading" for a more "natural reading," the majority finds in these words "some reasonable measure of discretion" supposedly ample to encompass what New York has done.

However, as the majority notes elsewhere, the "clear" meaning of the language to the man who presented it — the meaning he announced to the Senate which passed it — supports plaintiffs rather than defendants. Likewise, an identical predecessor was explained by its author contrary to the majority's interpretation. Far from answering our question, we only state it, acceptably all around, when we speak of a "reasonable discretion" left to the state legislature. The majority's Tables and Appendices, enlisting so unlikely a body of authority on the Federal Constitution as unannotated state statutes, could hardly be thought relevant if the words "as the legislature may direct" went very far toward a solution.

2. I come to the "contemporaneous interpretations" in the form of state statutes by which the majority has been "strongly influenced." There are many considerations, in my view, which should have served to weaken or dissipate the influence of this argument. I outline these thoughts in rougly ascending order of importance.

For one thing, these so-called "interpretations" consist only of the bare texts of various (and varying)[14] state statutes which were never tested or explained in any way that would endow them with reliable meaning. It reveals no privileged matter to say that in our conferences together we have found ourselves snarled in repeated errors and uncertainties when we debated these sparse, unfamiliar, unconstrued materials. Where patent issues of constitutional law were likely to be stirred whenever the limits were tested — but where the time for testing never came until now — we should hardly accept as a considered gloss upon the United States Constitution "the dead words of the written text[s][15] of diverse state statutes.

Even taking those texts by themselves, we find only five states whose statutes passed between 1913 and 1915 would seem literally to have allowed "temporary appointments" extending for more than two years.[16] And it is interesting to recall that New York was clearly outside this category; until 1951 its statutes would have required an election of Senator Kennedy's successor within less than five months after his death, on November 5, 1968.

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[14]The majority notes the variations. While the main opinion refers often to a "clear consensus" discerned in the state legislation, it also says "the wide variation" among the state statutes "reflects an interpretation of the Amendment which would allow the states a liberal degree of discretion * * *." I am sure the appearance of inconsistency is superficial only, but it does suggest how treacherous and ambiguous a guide to the Federal Constitution is supplied by collections of state statutory texts by themselves, with no illumination in the form of debates, court tests, or other sources of live understanding.

[15]*Nashville, C. & St. L. Ry.* v. *Browing*, 310 U.S. 362, 369 (1940); see also *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 209-10 (1956) (Mr. Justice Frankfurter concurring).

[16]Mich. Public Acts 1915, No. 156, p. 261-62; N.M. Laws 1915, J.R. No. 12, p. 172-73; N.C. Laws 1913, ch. 114, p. 206; Ohio Laws 1914, H.B. No. 3, p. 8; Pa. Laws 1913, No. 454, p. 995.

Going slightly beyond the state statutes to actual experience, we find a total of 156 gubernatorial appointments to the Senate in the years from 1913 through the beginning of 1967.[17] Of these, 109 (70%) ran for no more than a year; 128 (82%) for no more than 18 months; and 154 (98.7%) for no more than two years.[18] Measuring the period from inception of the vacancy to end of appointment (corresponding to the period of just under 30 months from Senator Kennedy's death on June 6, 1968, to the end of Senator Goodell's term on November 30, 1970, as announced by Governor Rockefeller), 106 (68%) of the recorded appointments would fall into the category of no longer than a year; 124 (80%) no longer than 18 months; and 152 (97%) no longer than two years.[19] In short the actual experience of temporary appointments in the 55 years since the Seventeenth Amendment became effective revals not a single case of an asserted power to appoint as broad as we have here, and only a minuscule number of approaches to this extreme.

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[17]Senate Manual, *supra* not 3 at pp. 661-725. In four instances, a vacancy was filled by appointment, the appointee died, and a successor appointee was named. Giving the benefit of any possible doubt to defendants herein, I have in each such instance tacked the appointments together and treated the pair as a single appointment for computing overall length.

[18]Two appointees served for approximately 25 months. Senator William M. Butler of Massachusetts served by appointment from November 13, 1924, to December 5, 1926. Senate Manual, *supra*, at 689. Senator Joseph H. Ball of Minnesota was appointed on October 14, 1940, and served until November 17, 1942. Senate Manual, *supra*, at 691.

[19]The longest period thus measured was 27 months. The term served by Senator Ball of Minnesota, *supra* note 18, lasting until November 17, 1942, was for a vacancy which had commenced on August 31, 1940. Senate Manual, p. 691.

That experience may serve as partial explanation why neither counsel nor judges have found square precedents to guide us.[20] But the important point now is that the so-called "contemporaneous interpretations" turn out to be untested and unreliable props for what is in fact a novel position in this case.

The absence of judicial or other contests over those state statutes is more than a negative generality; it is, in our context, a factor of potentially critical significance. For, as we have mentioned earlier, there is an old and salutary presumption favoring compression of appointive terms in elective offices. While New York's law officers now treat their State's constitutional embodiment of this principle as a protector of popular sovereignty only for *state* offices, we may suppose that other state officials and state courts might have applied the same bedrock doctrine to the Senate of the United States under the Seventeenth Amendment. And whether they would have or not, this first federal court to face the question should not fail to do so.

Moving onward, we come to some important principles and recent precedents impairing the supposed vigor of state statute books as authorities on Federal Constitutional Law While the majority speaks of "contemporaneous interpretations" as the essence of this point, it bears emphasis that the great bulk of the statutes supposedly favoring defendants (like New York's own) post-date by long periods the

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[20]Additional explanation may lie in differing conceptions of the non-justiciable "political question." It may be observed, however, that while they never came to the point of resolution, objections were in fact raised by interested groups to exercises of power approaching that involved here. Thus, when Senator Henry Cabot Lodge of Massachusetts died five days after the regular biennial state election and the appointee was to serve from November 13, 1924 to November 2, 1926, the Democrats threatened to seek the repeal of the Massachusetts statute on the ground that the appointment thus permitted was not "temporary." 1 Haynes, *The Senate of the United States* 166-67 n.2 (1966).

adoption of the Seventeenth Amendment. We are instructed on the soundest grounds, that "the views of a subsequent Congres form a hazardous basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313 (1960); *Waterman S.S. Corp. v. United States,* 381 U.S. 252, 268-69 (1965). Consider by comparison how utterly useless are later *state* enactments, by shifting memberships, with no slight evidence of constitutional questions actually faced, as indices to the meaning and intent of the varied "authors" of a federal constitutional amendment.[21]

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[21]We owe, and cheerfully pay, deference to state legislatures in their proper spheres. This is not a mandate, or even a license, to ignore what everybody, including judges, knows. Sitting as the first level of the judiciary responsible for saying authoritatively what the Federal Constitution means, we are compelled to know how poorly state legislative proceedings are geared for an authoritative share in the task. Deliberation and scholarship, let us admit, do not characterize the frequently hectic activities of these bodies. For references to the well known facts, see, e.g., Keefe, "The Function and Powers of the State Legislatures," and Wahlke, "Organization and Procedure," in The American Assembly, *State Legislatures in American Politics,* at 65-68 and 145-48, respectively (Heard ed. 1966); Keefe and Ogul, *The American Legislative Process* 126-28, 177-78, 191-93, 206-10, 244-48 (1964). For the proposition that even the national Congress, far superior in this respect, tends usually to leave constitutional question for the courts, see generally Morgan, *Congress and the Constitution* (1966).

The point is illustrated by reference to some statistical records, which are the only kind available, relating to the context of the state statute before us. N.Y. Election Law §296 was passed by the Assembly on March 15, 1951, the next-to-last day of the session. The Assembly on that day considered 124 bills and 10 resolutions. 123 of the bills and all of the resolutions were passed. 99 of the bills were passed with no negative votes. N.Y. Assembly Journal, 174th Sess., vol. 3, pp. 2779-2954 (1951). §296 was passed by a vote of 85-62. *Id.* pp. 2918-19. On March 16, the last day of the session, the Senate passed §296. It was one of 175 bills considered in the Senate on that day, along with 14 resolutions. 173 of the bills and all of the resolutions were passed. 157 of the bills were passed with no negative votes. N.Y. Senate Journal, 174th Sess., vol. 2, pp. 2008-2158 (1951). §296 was passed by a vote of 33-23. *Id.*, p. 2039. The Governor approved §296 on March 24, 1951. He signed 86 bills on that day.

In any event, far clearer, and more impressively "contemporaneous," assertions of power by state legislatures have fallen when they could not be squared with what the Federal Constitution was found compellingly to mean. Compare the decision of the Court in *Baker v. Carr*, 369 U.S. 186 (1962), with the dissents of Mr. Justice Frankfurter (*id.* at 310-18) and Mr. Justice Harlan (*id.* at 333-34); similarly, see the unavailing dissent in *Reynolds v. Sims*, 377 U.S. 533, 602-608 (1964); and see *Brown v. Board of Education*, 347 U.S. 483, 489 (1954), finding "[a]t best, * * * inconclusive" a history which included a showing that a majority of the States ratifying the Fourteenth Amendment had established segregated schools at the time of ratification or shortly thereafter, and that, in most instances, these States retained systems of segregated education for substantial numbers of years.[22] As *Baker v. Carr* and *Reynolds v. Sims* recall, a decision invalidating the only state statute actually before us would hardly be the first or most far-reaching determination that one or more States may have been insufficiently zealous to enforce fully the regime of popular sovereignty.

3. Let us talk now of the "state interests" deemed so "substantial" by the majority that they justify a "temporary appointment" which will leave to "the people * * * by election" only the power to fill *the last month* of the 32 that remained of Senator Kennedy's term when he was murdered.

As it is appealingly described by the State's Attorney General, one such supposedly weighty "interest" emerges from this proposition: "The selection of a candidate in a primary election and the election of the Senator at a

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[22] Appendix to the Supplemental Brief for the United States as Amicus Curiae at 160-393, *Brown* v. *Board of Education*, *supra*.

general election in either a gubernatorial or presidential [i.e., even-numbered] year insures the greatest numerical participation of voters in the selection of the Senator.''[23]

The troubles with the sentence are:

(1) When §296 was enacted in its present form (N.Y. Laws 1951, ch. 257), there was no direct primary election for Senator. Such primaries, still somewhat restricted in nature, were not created until 1967. Laws 1967, ch. 716, §2, effective January 1, 1968.[24] So all the talk in defendants' brief and the majority opinion extolling the virtues of primaries has nothing to do with the case because this could not conceivably have been any supposed part of the unannounced ''interests'' leading to the 1951 enactment before us.

(2) The asserted striving for ''greatest numerical participation of voters'' results, in the concrete (and only) cases before us, in (a) *no* participation by *any* voters, and (b) the selection of a Republican appointee to complete well over two years of a term to which a Democrat had been elected by the people.[25]

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[23]Memorandum of Law on Behalf of Defendants, pp. 10-11.
The troubles with the sentence are:

[24]Earlier, the voters had been empowered to elect delegates to party conventions, which in turn selected Senatorial candidates.

[25]The majority not only accepts defendants' theory about even-numbered years, but adds what I think is a strange embellishment. Since local elections occur in odd-numbered years (as Senate vacancy elections could and did until 1951), we are told that "[t]he Legislature might reasonably have concluded that local elections should be preserved from the more party-oriented political currents generated by statewide or national contests." When we talk about what the State Legislature "might * * * have concluded," since we have not a single word from a single legislator about what actually went on, the quality of speculation is not cramped. But this particular thought seems to me particularly imaginative, extending beyond what the State Attorney General and Solicitor General recreated on behalf of the defendant Governor and Secretary of State.

Counsel for defendants have also told us (and the majority embraces this) that there was a "consensus of those in the state that conducting a statewide election was too expensive a proposition, and therefore as the consensus of the political parties the biennial provision was put into Election Law 296." We should not be finicky about things like hearsay in a case of this kind. But we are entitled (or, probably, required) to know that the location of a "consensus" is sometimes an elusive task. It must be observed, moreover, that the asserted expense is nowhere particularized or documented beyond the generality just quoted. And it is worth noting again in this connection that New York's own Constitution (*supra* note 13), expensively or not, forbids the filling of state elective offices by appointments of more than approximately a year's duration.

This does not mean, of course, that the question of expense is immaterial. It means only that the subject must be kept in proportion. It is one thing to say "expense" and feel that this goes some distance to justify an extravagant postponement, for 2½ years, of a popular election. It is another, far more useful, far more pertinent thing to recall that Congressman Tucker, author of an identical predecessor to the provision we are construing, considered expense and deemed it a sufficient concern to permit the States, along traditional lines, to decide against the holding of more than one election *in a single year.*

Times have changed since 1892, and since 1913, but not in any way that makes money a more legitimate counterweight today against the value of popular elections. We are more affluent. Campaigning costs more. The problem of campaign expenses is real and troublesome. The problem has generated many proposed solutions, but rarely,

if ever, the idea that for this reason interim appointments, postponing popular elections, should be for longer periods.[26] It is not jingoistic or inapposite, considering our subject, to mention how sternly this century is testing our professed ideals. It may be supposed, therefore, that a people spending millions for jingles about toothpaste will not need to sacrifice or shrink the principle enshrined in the Seventeenth Amendment because it costs money.

To summarize it, my view about the "substantial state interests" stressed by the majority is that they are at least in some degree exaggerated; that the supposed benefits sought by the State in Election Law §296 are too remote and unsubstantial to warrant the resulting denial of the popular will; and that the bulk of the asserted objectives (selection of candidates at a primary, handling of campaign expenses) can be achieved without such impairment of so dear a constitutional value. Cf. *Harman v. Forssenius,* 380 U.S. 528, 543 (1965); *Swann v. Adams,* 385 U.S. 440, 444 (1967). This would be true if we were "balancing" the interests now in deciding how to write the Seventeenth Amendment. It is more clearly true, I submit, when we attend to the indicia of the meaning intended by those who wrote and adopted it for us over half a century ago.

---

[26]Cf., e.g., "Financing Political Campaigns," Hearings before the Senate Committee on Finance on S. 3496, 89th Cong., 2d Sess. (Aug. 18 and 19, 1966); "Political Campaign Financing Proposals," Hearings before the Senate Committee on Finance, 90th Cong., 1st Sess. (June 1, 2, 6-9, 1967).

IV.

The majority, sustaining a delay of 2½ years, is not required to decide, and does not decide, how much longer even than that the State might validly postpone a popular election. Concluding in dissent that 31 months is too long, I should and do express a view indicating how much is not too long. The answer, I have confessed already, cannot be mathematical, or mathematically demonstrated. But I conclude from the materials reviewed above that there is at least a powerful presumption against an appointment for over a year — i.e., for longer than the period of postponed legislative selection under the original Article I, section 3, clause 2. I would require the most impressive kind of justification for any asserted power to appoint for more than a year. I conclude specifically that the period of substantially over two years in question here is patently excessive.

While this conclusion would require a determination that a state legislative provision must be set aside in deference to the Federal Constitution, this surely would rank among the least exacerbated instances of such friction. Of course, the Seventeenth Amendment would have to prevail even if there were plausible reasons to wish otherwise. But it would be comforting that there is no occasion here for as much as sentimental regret. On plaintiffs' side is a claim to the right of popular election, "rank[ed] among our most precious freedoms." *Williams v. Rhodes*, —— U.S. ——, —— (1968), 37L.W. 4001, 4003 (10-15-68). On the other side is a claim of executive power which, even in the State's hierarchy of political powers, occupies the kind of subordinate role we would here assign it. There is, as I have sought to show, no substantial state interest — surely no "compelling interest," *id.* at —— — to enhance whatever doubts I should in candor acknowledge regarding a conclusion which is neither objectively demonstrable nor acceptable to my senior colleagues.

Finally, because the case appears destined for the Supreme Court, I complete this dissent with a few words about the defense suggestion that the Governor is not subject to an order in the nature of mandamus.[27] If we reached the suggestion, all three of us have surmised with confidence that we would reject it. "The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief. * * * The Governor of the State, in this respect, is in no different position from that of other state officials." *Sterling v. Constantin,* 287 U.S. 378, 393 (1932). Nothing in the *New York* cases defendants cite limits the scope of "appropriate relief" to forms outside the area traditionally called "mandamus."

But it would prove unnecessary to consider this subject at all — including the debatable assumption that the pertinent writ might resemble mandamns. As we could have predicted, the Governor has given his assurance, through his Solicitor General, that a final judgment in this case declaring the constitutional rule will be followed by him and the other responsible officials of the State. There would be no need, therefore, to go beyond the plaintiffs' prayer for declaratory relief.

I would grant the prayer and adjudge that N.Y. Election Law § 296, together with defendants' action under it, must be declared invalid under the Seventeenth Amendment.

Dated: New York, New York
November ,1968

MARVIN E. FRANKEL
U.S.D.J.

---

[27] No similar suggestion is made — in fact, it is expressly disclaimed — with respect to the defendant Secretary of State.

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(3340)

IN THE

Supreme Court of the United States

No. 773, October Term, 1968

JOSEPH A. VALENTI,

Appellant,

against

NELSON A. ROCKEFELLER, Governor of the State of New York, and JOHN P. LOMENZO, Secretary of State of the State of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION ON BEHALF OF APPELLEES TO DISMISS OR AFFIRM

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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United States Constitution, Amendment XIII .. 2, 3, 4, 5, 6, 7

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No. 773, October Term, 1968

JOSEPH A. VALENTI,

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Appellees.

MOTION ON BEHALF OF APPELLEES TO DISMISS OR AFFIRM

Nelson A. Rockefeller, Governor of the State of New rk, and John P. Lomenzo, Secretary of State of the ate of New York, appellees in the above-entitled matter, ve to dismiss the appeal herein on the ground that the peal presents no substantial federal question and, in the ernative, move to affirm the order appealed from on the ound that the questions raised in the appeal were cor- tly decided by the Court below and are so unsubstantial not to need further argument.

Statement

On January 3, 1965, Robert F. Kennedy began serving a l six year term as United States Senator from the State New York, which term expires on January 3, 1971.

The primary election in 1968 in New York State was set by the Legislature for June 18, 1968. On June 6, 1968, twelve days before that primary election date, Senator Kennedy died and his office thereupon became vacant by operation of law. That vacancy was then required to be filled in accordance with the provision of Amendment XVII to the Constitution of the United States. That Amendment provides in pertinent part:

> "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies. *Provided,* that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

Pursuant to the authority granted by that Amendment, the Legislature of the State of New York enacted what now constitutes Section 296 of the New York Election Law, which provides:

> "At the general election next preceding the expiration of the term of office of a United States senator from this state, a United States senator shall be elected by the people for a full term of six years. If a vacancy occur in the office of United States senator from this state in any even numbered calendar year less than sixty days prior to an annual fall primary* election, or thereafter during said even numbered year, the governor shall make a temporary appointment to fill such vacancy until the first day of December in the next even numbered calendar year. If such vacancy occur in any even numbered calendar year sixty days or more prior to an annual fall primary election, the

* By amendment of N. Y. Election Law, § 191, the fall primaries were abolished effective January 1, 1966 (N. Y. Laws of 1965, ch. 1070) and the primary elections confined solely to one primary to be known as a spring primary and all references to the fall primary were made applicable to the spring primary election.

governor shall make a temporary appointment to fill such vacancy until the first day of December in such even numbered calendar year. If a vacancy occurs in the office of United States senator from this state in any odd numbered calendar year, the governor shall make a temporary appointment to fill such vacancy until the first day of December in the next even numbered calendar year. Such an appointment shall be evidenced by a certificate of the governor which shall be filed in the office of the secretary of state. At the time of filing such certificate, the governor shall issue and file in the office of the secretary of state a writ of election directing the election of a United States senator to fill such vacancy for the unexpired term at the general election next preceding the expiration of the term of such appointment."

Pursuant to Section 296, the only statutory authorization in this State for filling the office of United States Senator, the Governor was thereupon empowered to fill the vacancy by temporary appointment for a period ending December 1, 1970.

On July 16, 1968, a summons was issued in this case and the complaint served on the defendants on July 19, 1968. On July 17, 1968 a summons was issued from the United States District Court for the Southern District of New York in a substantially similar case entitled *Phillips* v. *Rockefeller,* and served on the defendants on July 22 and 23 respectively. On July 19, 1968, another summons was issued in the Southern District in an action entitled *Backer* v. *Rockefeller.* That summons and complaint were served on defendant on July 23, 1968.

All three actions sought the convening of a three-judge court and a declaratory judgment to the effect that New York Election Law, § 296 is unconstitutional and void as being in conflict with the provisions of Amendment XVII to the Constitution of the United States. All three actions

also sought an order mandating a writ of election directing the vacancy to be filled by election on November 5, 1968.

Defendants' answer in each case denied the allegations of unconstitutionality.

The actions were heard together before a single three-judge court, convened in the Southern District of New York, on August 7, 1968. Subsequent to argument and prior to the decision of the Court, Charles E. Goodell was appointed by Governor Rockefeller to fill the vacancy for a term ending December 1, 1970 and a writ of election was issued for the November 1970 election to fill the vacancy for the remainder of the unexpired term (December 1, 1970 to January 3, 1971).

The three-judge court, in a decision concurred in by two of the judges held that the provisions of New York Election Law, § 296 did not exceed the permissible limits of discretion conferred upon the states by the Seventeenth Amendment concerning the time and conduct of Senate vacancy elections and dismissed the complaints.*

In holding the statute valid, the basis for the majority decision was stated initially in the opinion (A4):

> "Substantial state interests are furthered by the decisions of the New York Legislature that Senate vacancy elections be held only in conjunction with regular congressional elections, and that candidates for vacancy elections be selected through the state's modified direct primary system.
>
> "Our decision is strongly influenced by the fact that from the ratification of the Seventeenth Amendment in

* The Court's opinion and the dissent have been printed in full as Appendix A to Appellant's Statement as to Jurisdiction. Page references to that opinion herein will refer to pages of that printed Appendix.

1913 down to the present day most state legislatures have interpreted its provisions as authorizing the enactment of vacancy election statutes very similar to the New York law attacked here. Accordingly we find that an election in November, 1970 to fill this vacancy will be in compliance with the Amendment."

The majority pointed out that the Seventeenth Amendment authorizes the Governor to make a temporary appointment and that the appointee may hold office "until the people fill the vacanc[y] by election *as the legislature may direct*" (A7). Effect must be given, the opinion stated, to the natural reading of the Amendment as adopted and that such a reading grants to the states some reasonable degree of discretion concerning both the timing of vacancy elections and the procedures to be used in selecting candidates for such elections.

ARGUMENT

The appeal raises so unsubstantial a federal question that no further argument is necessary.

The appellant here contends that the variety in the provisions of the statutes of the various states requires interpretation of the Seventeenth Amendment by this Court in order to achieve a uniformity of interpretation and presumably, therefore, a uniformity of provisions. Appellees submit that in view of the provisions of that Amendment, clearly granting a measure of discretion to the states, that argument presents no substantial federal constitutional question to be decided by this Court.

Amendment XVII provides upon the occurrence of a vacancy in the office of United States Senator that

1) the governor shall issue a writ of election to fill the vacancy

2) the governor is authorized to make a temporary appointment to fill the vacancy until the vacancy is filled by election, and,

3) the state legislature is empowered to determine the manner of filling the vacancy by election.

A review of the provisions of New York Election Law, § 296 shows that New York's statute obviously and on its face complies with the requirements of Amendment XVII.

First, as to the issuance of a writ of election, Election Law, § 296 requires that the Governor issue a writ of election at the same time the certificate of temporary appointment is filed. The time that appointment is made, the certificate filed and the writ issued are immaterial. It is not the timing of these acts which determines the date of the election to fill the vacancy but rather the date of occurrence of the vacancy itself. Consequently, Election Law, § 296 complies with the requirements of Amendment XVII in this regard since a writ of election must be issued under that section.

Secondly, the appointment made by the Governor is clearly described by Section 296 as a "temporary appointment" and its duration varies, dependent upon the date of happening of the vacancy, from approximately eight months at the least to approximately two years and seven months at the longest. This results from the provision of three separate alternatives as to appointment. The length of the terms are all dependent upon two requirements; one, that a primary election intervene between the occurrence of the vacancy and the election to fill it and that the election itself occur in an even numbered year. Even a cursory analysis of these requirements makes the basis for those provisions obvious. The possibility of the selection of a candidate in a primary election and the election of the

Senator at a general election in either a gubernatorial or presidential year insures the greatest numerical participation of voters in the selection of the Senator.

Thirdly, all of these provisions are legislative enactments as authorized by Amendment XVII. They are clearly a reasonable exercise of the discretion granted to the states by the Amendment, which itself required no uniformity in such statutes.

The crux of the arguments advanced by the appellant is not the fact that Section 296 authorizes the Governor to make a temporary appointment to fill the vacancy but rather the duration of that appointment which by virtue of the date of Senator Kennedy's death, June 6, 1968, less than 60 days prior to the June 18 primary in 1968 will result in the appointee serving until December 1, 1970, a date made more significant by the fact that Senator Kennedy's term expires January 3, 1971. These two most significant factors (the date of occurrence of the vacancy and the date of expiration of the full term), it must be remembered, are not factors which were in any way planned or subject to the control of the Governor or the State of New York. If Senator Kennedy's term had expired on January 3, 1973, instead of 1971, the duration of the temporary appointment would have lost much of its significance.

The only question is whether a term of office running from sometime in 1968 to December 1, 1970 constitutes a "temporary" appointment. It is submitted that obviously it does, since this period is less than a full six year term. And it is further submitted that New York Election Law, Section 296 is not unreasonable and is clearly constitutional and presents no substantial federal question for decision by this Court.

Furthermore, the appeal is rendered moot by the fact that the plaintiff sought to mandate the filling of the vacancy at the November 5, 1968 election. That relief is, of course, now totally academic.

CONCLUSION

The appeal herein should be dismissed for lack of a substantial federal question, or, in the alternative, the order appealed from should be affirmed, on the ground that the questions raised in the appeal were correctly decided by the Court below and are so unsubstantial as not to need further argument.

Dated: December 19, 1968.

Respectfully submitted,

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968.

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Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Preliminary Statement.

On January 20, 1969, this court granted the motion of the appellees to affirm the judgment of dismissal rendered below. Appellant had filed his jurisdictional statement and appendix on November 25, 1968, and the motion to affirm was made on December 19, 1968. No briefs were ever filed on behalf of any of the parties.

So summary a dismissal of the first case ever to reach this court seeking construction of the elective rights granted the people under the Seventeenth Amendment strongly implies failure on the part of appellant's advocate to present a proper case. For this is no mean or ordinary federal question. Primarily it is a question

that spans fifty years of our National life. It is a question that raises the fundamental values upon which we have built all our political institutions.

But, most importantly, the question pertains to the United States Senate, at once the most powerful, and most influential political body on earth; a political body which frequently decides closely contested political questions, a body limited to one hundred members, a body whose voting record demonstrates again and again the critical nature of just one vote; a body, accordingly, whose members the people should have a constitutional right to elect.

It is for these reasons that appellant files this petition for rehearing. For the majority opinion below, despite the prestige and credit of its author, is wrong,—wrong in its tactics, wrong in its emphasis, wrong in its conclusions—and most of all, a personal wrong to those men who sat in the Senate and brought about—from within—the great reform that is the Seventeenth Amendment.

Grounds for Rehearing.

(a.)

The institutional integrity of the federal government requires reversal.

Institutional integrity is a meaningless phrase unless specifics put substance in it. The specifics in this case are not meaningless, however. There are two particulars in which the judgment below violates institutional integrity: First, the United States Senate itself, after twenty years of debate and a climax of unprecedented political drama, decided the principle that state governments should not have exclusive and unfettered discretion over the conduct of Senate elections; Second: The United States Senate itself, after fifty years of deliberation, changed its own constituency from the state governmental institutions (the governor and the state legislature), to the people of each state directly. What do these Senate changes mean if a semantic ambiguity in the Seventeenth Amendment can return to the governor and a state legislature: First, the power to postpone the sovereignty of the people for almost half the Senatorial term; and Second: The power to make an appointed Senator responsive to the constituency of the Governor and the State Legislature, for his appointive term, rather than to the people at large for his election?

Ultimately, however, the policy question is even more basic. How can the Senate (or the people, for that matter), make this court, which is part of the institution that is the federal government, enforce judicially those political decisions which the Senate made over half a century ago? There is no method of enforcement, save the integrity of the members of the one institution to the other. And this integrity, in this case, must be exercised among members who never knew nor met the other.

(1.) *The Political Evolution of the Senate's Decision*

The first resolution providing for a change from State Legislature election to the popular election of senators was presented on January 14, 1850, by Senator Clemens of Alabama. See Sen. Document No. 666, p. 3 (1912). Debate and committee study of these and similar measures did not begin, however, until 1873. *Idem.*, p. 4.

The political positions polarized within the Senate from then on. There were three (3) groups: Southern and southwestern Democrats who favored the reform but also wanted to use it as a vehicle through which to repeal Article I, Section 4, which gave the federal government power to regulate state election of members of Congress (Reconstruction had made the Southerners wary of "force bills," a legislative device whereby the federal Congress overrode decisions of the political institutions of the southern states. They wanted to remove federal power to enact "force bills" in order to protect Southern election machinery); Eastern Republicans who opposed the change and wished to keep the *status quo* (the reasons here are more obscure, but the charges of the Southerners were that it was easier for Republican business interests to bribe a Governor or a State Legislature, than to bribe the entire state population. Sen. Borah of Idaho outlined these abuses when he introduced the resolution. 46 Cong. Rec., pp. 1105-1106 [19 Jan. 1911]); Midwestern and western Populists—most Republican, but some Democrats, who advocated the reform on grounds of democratic principles. Because of this three-way split the Southerners held the balance of power, and they delayed the progress of the Seventeenth Amendment until the "southern version" was enacted.

The Southern version came from Representative Henry St. George Tucker of Virginia in 1892 and *No Other Resolution* ever had a chance of getting the necessary two-thirds of each house of the Congress. So it is well here to recall the words of this court's most senior member in a recent concurring opinion:

> "Professor Fairman's 'history' relies very heavily on what was *not* said in the State Legislatures that passed the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what *was* said, and, most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate, that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means." *Duncan v. Louisiana,* U. S. , 20 L. Ed. 491 at p. 505 (1968).

Tucker's southern credentials were impeccable. He was a constitutional lawyer of the first rank, a strict constructionist in the nineteenth century tradition, and sensitive in the extreme to the uses of constitutional

language. He drafted the Seventeenth Amendment to the Constitution as closely as possible to words and intendments already set out in that document:

(See opposite page.) ☞

	SOURCE	DRAFT
HOUSE --	Article I, section 2 The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.	Paragraph I The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures.
SENATE --	Article I, section 3 The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof, for six years: And each Senator shall have one vote.	Amendment XVII, paragraph 1.
CONGRESS --	Article I, section 4 The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof, but the Congress may at any time by law make or alter such regulations except as to the place of choosing Senators.	Paragraph II. The times, places and manner of holding elections for Senators shall be as prescribed in each state by the Legislature thereof.

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The deliberation and debate lasted twenty years. The three groups slowly changed in character. The Populists and Southerners grew politically stronger; the eastern Republicans weaker. It was a political contest for power all the way. Control of the Senate was at stake..

Tucker's draft, Senate Joint Resolution No. 134, and House Joint Resolution No. 39 are identical. House Joint Resolution No. 39 became the Seventeenth Amendment.

In 1911 during debate on Senate Joint Resolution No. 134, Senator Nelson of Minnesota stated:

> "The joint resolution reported by the Senator from Idaho and now under consideration is an exact copy of a joint resolution to amend the Constitution reported by Representative Tucker of Virginia, in the 52nd Congress on the 16th day of February, 1892. It is exactly identical with that resolution. Mr. Tucker, in his report, unlike the Senator from Idaho in his report, was candid enough *to state what the entire purpose of the joint resolution was.*" 46 Cong. Rec. (pt. 3), p. 2940. (Italics added.)

* * *

The Committee reports in respect to Tucker's draft, Borah's Joint Resolution No. 134, and House Joint Resolution No. 39, are contained in a Xeroxed supplement filed contemporaneously with this petition for rehearing. Reading them, and the corresponding proceedings in the Congressional Record, is all that is necessary to refute the observation of Judge Lumbard in the majority opinion that Tucker's was an "isolated statement,"[1] or a "bit of legislative history."[2] What is more, such a reading supplies conclusive proof that the Congress in 1912 was

---

[1]Valenti Statement as to Jurisdiction, Appendix A, p. A27.

[2]Iden. at p. A28.

"cognizant of his [Tucker's] opinion." Judge Lumbard's statement:

> "Little weight can be given to Representative Tucker's 1892 interpretation of his vacancy provision since there is no indication that the Congress which proposed the Seventeenth Amendment was even cognizant of his opinion."[3]

is incredible in view of the contents of the Congressional Record, Senator Nelson's remarks, and Senator Rayner's rebuttal. (Senator Rayner was the southern member of the three-man special Senate Committee that reported out Joint Resolution No. 134 to the Senate floor. And Rayner acknowledged his purpose was to repeal Article I, Section 4, as Tucker's report had recommended. 46 Cong. Rec. 2941.)

It is all the more incredible when Tucker himself is studied. Representative Tucker was the son of John Randolph Tucker, related to Governor Randolph of Virginia, whose participation in the debates at the federal convention in Philadelphia in 1787 led to the Constitution itself. He was the grandson of Henry St. George Tucker, a president of the Court of Appeals of Virginia. His father was professor of Constitutional Law at Washington and Lee, and a Doctor of Laws. Representative Tucker himself taught at Washington and Lee as Professor of Constitutional Law, and his two volume work on the Constitution of the United States (Callaghan and Co. 1899) stood as a prime authority for years.[4] In that work, he states, in regard to the Seventeenth Amendment:

---

[3]Valenti Statement as to Jurisdiction, App. A, p. A28.

[4]Petitioner does not offer these facts to side with an Aristocratic Elite. The point is that the southern contingent in the late nineteenth and early twentieth centuries believed in an aristocratic elite and followed such persons from deep respect. Accordingly, Tucker's influence among them was prodigious.

> "It is hardly proper in a work devoted to consideration of the Constitution as it is to discuss the propriety of proposed amendments until they shall have been finally acted upon. But it may be remarked that the proposed amendment indicates a drift of public sentiment in favor of a direct relation of the Senator to the people of the state, rather than to the legislative organization of the state, for often a majority of the voters in a state would select a senator different from the one a majority of the legislature might choose." At page 406.

He was the *author* of the Seventeenth Amendment; his was the *only* opinion that mattered to the sponsoring group of Senators, and, in the political context of 1892-1912 they held the balance of political power in the Senate and in the House.

It is ignorance to brush aside Representative Tucker's report as an isolated bit of legislative history, when Tucker dedicated his life to the study of Constitutional Law, and his political career to the reform of the Senate. And it is a travesty on institutional integrity, and on Tucker's ultimate victory, to let that majority opinion stand as it has.

Tucker's version limited "temporary appointments" in the Seventeenth Amendment's vacancy provisions to a year or less, and his victory ought not to be deprecated with so casual a reference.

The political climax of the effort to reform the Senate occurred when Senator Bristow moved in the first session of the 62nd Congress (but only three [3] months after Borah had moved the Joint Resolution) to amend Tucker's draft, by deleting its second paragraph. 47 Cong. Rec. 1205. Senator Bristow explained his entire amendment a week later on the Senate floor. 47 Cong. Rec. 1482-83. The vote came on June 12, 1911. The Bristow

amendment passed the Senate 45-44 with the Vice-President breaking the tie. 47 Cong. Rec. 1923.

Of course, Borah's Joint Resolution No. 134 died in the House of Representatives, until a joint conference could work it out. Again, the Southerners defeated it because the Bristow amendment had deprived them of a repeal of Article I, Section 4. However, Congressman Rucker of Missouri prevailed upon the southern contingent in the House to accept the Senate's version and to yield the effort to repeal Section 4 of Article I. In 1912, southern insistence on the "all or nothing" draft of Representative Tucker yielded to the good sense and persuasion of Congressman Rucker, and the measure finally passed Congress.

What the Congress had decided then, was that, as a matter of principle, the states should not have broad and powerful discretion over the conduct of Senate elections. Yet the majority opinion below proceeds upon exactly the opposite principle.

With so dramatic a climax, and so prolonged a political struggle, the Legislative history behind the Seventeenth Amendment in the Senate is a fascinating study in miniature of American history during Reconstruction, and the ensuing Populist Movement. Since the amendment pertains to the Senate, and since the Congress grappled with it for so long, institutional integrity requires that Congressional deliberations be a *preferred* source of constitutional interpretation.

Yet for reasons incomprehensible to appellant, the court below sought out tables of state statutes to "aid" their judgment, and dabbled with Congressional materials in a totally superficial and shallow manner.

The point is simply this. From what Justice Black said in *Duncan,* and from any experience with legislative bodies, two principles of interpretation emerge:

1) What is important is what *is said*, not what is *not said.*

2) What the sponsors say a bill means, other members accept.

Tucker's draft stayed in the legislative crucible twenty years—longer than most members have sat on this court—and it held the political spotlight for a great deal of that time. Could anyone who voted in 1912 *not have known* what Tucker, the original sponsor and author meant by his vacancy paragraph? Although the political debate did not focus on vacancies in particular, the focus itself was on what Tucker had proposed. How is it possible for a federal court to conclude, in view of such Legislative history, that Tucker's interpretation should be given "little weight"? And, finally—and most galling, how is it possible, more than fifty years after the States' righters themselves have yielded the principle for a federal court to interpret the Seventeenth Amendment as conferring broad discretion on the State government institutions in respect to Senate vacancy elections? How long? How long shall it be before that empty issue dies? How long before the sovereignty of the people prevails, and the state political institutions depart? Where has the sense of political values gone when a federal court can resurrect so dead an issue?

(2.) *The Effect of the Political Decisions on Interpretation of the Amendment*

The Seventeenth Amendment now reads without Tucker's second paragraph. To understand it, Article I, Section 4, must be read as paragraph 2. It is clear then that

Article I, Section 4, does not confer discretion in respect to vacancy elections, but only in respect to regular Senate elections. Vacancy elections in Tucker's draft, and in the Seventeenth Amendment, received separate and special treatment, as they originally had in the Constitution as first written.

Also the phrase "as the Legislature may direct" (the "bloated tag-end phrase" which Judge Frankel describes in his dissent), loses much force. In Tucker's draft it related back to his paragraph No. 2 as a logical tie-in phrase. But Congress repealed his paragraph No. 2. So a good argument exists that the Bristow amendment impliedly repealed that tag-end phrase as well. Yet the majority opinion below has founded its whole judgment on those few words, and has erected tables of hopelessly confused state statutes as verification for the existence of a broad state discretion in the amendment.

Petitioner says not so. The political decisions of the Senate—regardless of whether we concur—bind the federal courts and all federal institutions. And most emphatically should this be so when the Senate has decided an issue about itself. And the duty of all co-ordinate federal institutions is to implement and preserve the integrity of those decisions. They deserve enforcement in the most liberal interpretation which a court can afford. The implied repeal of broad state discretion, overwhelmingly indicated by the adoption of the Bristow amendment, bars resort to state statutory interpretation as a reliable guide to the meaning of the Seventeenth Amendment.

(b.)

The canons of constitutional construction require reversal.

In respect to interpretive canons of constitutional construction, appellant can add little of academic value beyond what Judge Frankel has already supplied in his dissent.[5] What neither opinion did, however, was to present state statutes in respect to the filling of vacancies in the House of Representatives. The command of the Seventeenth Amendment in respect to writs of election derived from the text of Article I, Section 2, paragraph 4. Again, Tucker's draft and all committee reports provide incontrovertible proof of that.

What is most relevant then, as to what the Seventeenth Amendment vacancy writ mandate means, are—if we are to pursue the logic of Judges Lumbard and Henderson to its penultimate conclusions—the state statutes in respect to House vacancies. And for contemporaneous—or as nearly so as possible—interpretation, we should look to ALL the original thirteen states, not, as the majority did, to Arizona, New Mexico, Utah and Wisconsin.[6]

Table I on the next page follows this pursuit of state legislation, and adds Vermont, Alabama, and Maine for territorial nicety. The common denominator throughout, without exception, is that the constitutional mandate requires a special election to fill the vacancy. The use of minimum periods of twenty (20), thirty (30) and fifty (50) days characterizes the legislation. We must contrast this with the more than two and one-half years de-

[5]Statement as to Jurisdiction—Appendix A, pp. A67-A69.

[6]Statement as to Jurisdiction—Appendix A, p. A21.

lay in respect to the Senate vacancy election herein.[7] And this is state legislative interpretation of exactly the same language, derived from an identical source.

The logic of the majority opinion is to refer to those very few states whose House vacancy statutes leave timing in an ambiguous limbo, and to ignore the great majority of states whose House vacancy statutes enjoin a prompt issuance of the election writ, in order to conclude that prompt special elections are unnecessary. (For if a few say promptness is not necessary, it cannot be constitutionally impermissible.) Then, as to Senate vacancies, the majority cites the large number of states who might have laws as broad as New York's, and concludes that what the majority of states have done is what is constitutionally permissible. This is adopting a different interpretive canon to construe identical language. For if the canon is what most states have done, then what most have done in respect to House vacancies conflicts with what most have done in respect to Senate vacancies notwithstanding the same mandate, and the very same language applies. And that conflict should be admitted, argued, and resolved by judgment. But if the canon is what a select few states have done, then because as few have ordered Senate elections within a year, as have allowed postponements of House vacancy elections, there is a similar conflict. Again, the language is identical.

---

[7]It is interesting to note in this connection, that Senator Goodell, who replaced Senator Kennedy, was a Representative in Congress. The seat he vacated in Congress (New York 38th District) on September 9, 1968, was filled by election by the people at the general election on November 5, 1968.

What the majority has done is to adopt the canon that produces the desired result—hardly a commendable practice for court opinions.

(See opposite page.) ☞

TABLE I

I. STATE STATUTES AS TO VACANCIES IN THE HOUSE OF REPRESENTATIVES

STATE	EARLIEST DATE	Vacancy Election at the Discretion of Governor	Special Election within a Year or at Governor's call	Vacancy Filled at Next Annual Election	Vacancy Filled at Next Biennial Election
Alabama Title 17 , Section 215			X (Minimum wait of 30 days)		
Connecticut Gen. Stat. 9-212			X		
Delaware Title 15, Ch. 73, Section 7301	1852		X		
Georgia Ga. Code Ann. 34-804			X (Minimum wait of 30 days)		
Maine Title 21, Section 1532	1833		X		
Massachusetts Ann. Laws - Title 54, Sec. 140	1833				
Maryland Ann. Code - Art. 33, Sec. 158 (b)			X (Not less than 20 days)		

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STATE	EARLIEST DATE	Vacancy Election at the Discretion of Governor	Special Election within a Year or at Governor's Call	Vacancy Filled at Next Annual Election	Vacancy Filled at Next Biennial Election
New Hampshire Rev. Stat. Ann. 63-13	1848		X (Forthwith)		
New Jersey Stat. Ann. -Tit. 19, Sec. 27.4 - 27 10.1			X (Fifty (50) day minimum)	X	
New York Election Law-Sec. 143, 278(4), and 297	1896		X		
North Carolina Gen. Stat. 163-13	1901		X		
Pennsylvania Pa. Stat. Ann. -Tit. 25, Sec. 2777			X (Call in 10 days, minimum 30 day wait)		
Rhode Island Gen. Laws 17-3-9	1901		X (forthwith)		
South Carolina (No Statute)					
Virginia - Code , Sec. 24-6	1919		X		
Vermont Vt. Stat. Ann., Tit. 17, Sec. 1701	1794		X		

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The House vacancy provision has been the subject of Congressional legislation as well as state enactments. Much weight should attach to an act of Congress. The statute Congress passed reads as follows:

> Chapter XI, Section 4—February, 1872
>
> "That if, upon a trial, there shall be a failure to elect a Representative or Delegate in Congress in any State, District, or Territory, upon the day hereby fixed and established for such election or if, after any such election, a vacancy shall occur in any such State, District, or Territory, from death, resignation, or otherwise, *an election shall be held to fill any vacancy caused by such failure, resignation, death, or otherwise* at such time as is or may be provided by law for filling vacancies in the State or Territory in which the same may occur." (Italics added.)
>
> 17 Statutes-at-Large—p. 29 (1872)

The revisers have codified and edited the at-large version into what now is Title 2 of the U. S. Code, Section 8.

> "8. *Vacancies*—The time for holding elections in any state, district, or territory for a representative or delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation or incapacity of a person elected, many be prescribed by the laws of the several States and Territories respectively."

The reviser's edition, it is submitted, unwisely omits that highly significant phrase, italicized in the at-large text, "an election shall be held * * *"

The ambiguity that persists throughout the Congressional enactment above, the state laws enacted and referred to, and in the Constitution itself is simply this:

The mandate is in both cases:

> "When vacancies happen, * * * the executive authority shall issue writs of election to fill such vacancies,"

but the mandate is subject to Article I, Section 4, in both cases:

> "4. The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof. * * *"

The mandate contemplates contemporaneous action, urgency, prompt response. The discretion as to timing, the discretion as to "temporary appointments," subverts the mandate. Yet there comes a point when an election delayed becomes an election denied.

It is the responsibility of the judicial branch of government to fix that point in time where delay becomes denial. To do so, the courts must further the spirit and intent of the amendment and of the political values it expresses—values which this court, in many recent decisions, has elevated to the highest order of constitutional rights. *Reynolds v. Sims*; *Baker v. Carr*; *Westberry v. Saunders*; *Williams v. Rhodes,* are landmarks, and need no citation.

The Seventeenth Amendment was a political decision. It expressed a value-judgment that election of senators by the people was preferable to election by state legislators, or appointments by state executives. The court below has held that, notwithstanding this value-judgment at the heart of the amendment, the principles of federalism—as expounded in the style of the late Mr. Justice Frankfurter—precludes judicial interference with asserted States' rights. Appellant's complaint is that this decision is not *Judgment,* not *Interpretation,* but espousal of a contradictory political principle.

Conclusion.

For the foregoing reasons, appellant respectfully prays that this court grant a rehearing, and that, upon further consideration, the judgment of the United States District Court for the Western District of New York be reversed.

Certificate of Counsel.

I, JOHN MANNING REGAN, do hereby certify for the appellant above-named, that the petition for rehearing submitted herewith is presented in good faith and not for delay.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 773

JOSEPH A. F. VALENTI,

Appellant,

v.

NELSON A. ROCKEFELLER, Governor of the State of New York, and JOHN P. LOMENZO, Secretary of State of the State of New York,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

SUPPLEMENT TO PETITION FOR REHEARING

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52D CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 368.

ELECTION OF SENATORS.

FEBRUARY 16, 1892.—Referred to the House Calendar and ordered to be printed.

Mr. TUCKER, from the Select Committee on the Election of President and Vice-President and Representatives in Congress, submitted the following

REPORT:

[To accompany H. Res. 90.]

Mr. Tucker, from the Committee on the Election of President and Vice-President and Representatives in Congress, submits the following report:

The joint resolution which has been referred back favorably by the Committee on the Election of President and Vice-President and Representatives in Congress is as follows:

JOINT RESOLUTION proposing an amendment to the Constitution providing that Senators shall be elected by the people of the several States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That in lieu of the first paragraph of section three of article one of the Constitution of the United States, and in lieu of so much of paragraph two of the same section as relates to the filling of vacancies, and in lieu of all of paragraph one of section four of said article one, in so far as the same relates to any authority in Congress to make or alter regulations as to the times or manner of holding elections for Senators, the following be proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the States:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

"The times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof.

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the legislature may direct.

"This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

It seeks to change and annul the following provisions of the Constitution—Article I, section 3, clause 1:

The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years; and each Senator shall have one vote.

It is proposed to change this so that it will read as follows:

The Senate of the United States shall be composed of two Senators from each State, *elected by the people thereof* for six years; and each Senator shall have one vote;

and adding thereto the qualifications of electors, providing that they shall be the same as those for Representatives in Congress. So much of

clause 2, section 3 of Article I as relates to the mode of filling vacancies is changed in the manner and form set forth in the proposed joint resolution.

ARTICLE I, section 4, clause 1 is as follows:

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

It is proposed to abrogate and annul the above in so far as it gives to Congress any control, absolute or remote and contingent, over the election of United States Senators by substituting the following language or so much thereof as refers to the election of Senators:

> The times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof.

In the resolutions proposed by Mr. Edmund Randolph, of Virginia, to the Federal convention for ratification it was provided—

> 5. *Resolved*, That the members of the second branch (the Senate) of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual legislatures, etc.

In the draft of a Federal Government by Mr. Chas. Pinckney, of South Carolina, it was provided that the Senate should be chosen by the House of Delegates (Representatives)—and in the draft submitted by Mr. Hamilton it was proposed to elect Senators to hold during good behavior—"their election to be made by electors chosen for that purpose by the people" (Elliott, I, 212). On agreeing to the fifth resolution of Mr. Randolph *nine States* voted nay, none voted yea, and one was divided (Jour. Fed. Con., 36).

On motion of Mr. Wilson (Pennsylvania) to elect Senators by the people, it passed in the negative—ten States voting *nay*, and Pennsylvania alone voting *yea* (Jour. Fed. Con., 106). Finally, June 25th, 1787, on motion to elect Senators by the legislatures of the several States it was agreed to—nine States voting *yea* and two States (Pennsylvania and Virginia) voting *nay* (Jour. Fed. Con., 147).

Representation in the Senate seems to have been one of the chief—if not *the* principal—causes of dissension in the Federal Convention—one party, led by Mr. Madison and others, insisting that representation should be proportionate to numbers and by districts, similar to the mode of representation in the House; the other party (the small States) insisting with equal pertinacity that the States, as States, should be the units of representation. The struggle was protracted, bitter, and passionate, and at one time it seemed as though the convention would go to pieces on this question. Better counsels finally prevailed and the small States were victorious, establishing the representation of the States, as such, as the units of representation.

Any amendment to the Constitution which sought to break down this initial principle in its construction would indeed be dangerous; this proposed amendment seeks only to emphasize that principle by giving the representation to the sovereign power in the State, rather than to the delegated power of that sovereignty as represented in the legislature.

I.

The change of mode of election of Senators from the legislature to the people, as proposed, has the sanction of almost a universal popular demand. This is not conclusive of the propriety of the proposed

change, but is strongly persuasive of the inadequacy of the present plan.

Your committee submit the following reasons for recommending the proposed change:

(1) The legislature, being a body of limited numbers, is more amenable to undue influence and the corrupting power of corporate aggressions and individual wealth than would be the entire population of a State.

The public press for years (in each recurring year) has been teeming with legislative scandals in the election of Senators until bribery and corruption are, we fear, in some localities, fast becoming recognized as a part of the legislative function, while the capacity of the pocketbook rather than that of the head is regarded in like places as the measure of Senatorial equipment. Committees of investigation and the grand juries of the States have been unwilling or unable to detect the frauds, so skillful have the manipulators of it become until, at last, an outraged public sentiment has become aroused and has found its just expression in the proposed amendment.

(2) *Power and responsibility* should go together, hand in hand. In a Republic like ours the representative of political power, for the good of the Republic, should be answerable for his acts to some *certain constituency*. To whom, we ask, is a Senator now answerable for his conduct? To the legislature? This body changes three times during his service. A Senator elected to-day for six years by a legislature comes back in six years seeking reëlection before another legislature composed of almost entirely new men. His pledges to the body that elected him are *nudum pactum* to the new legislature, which was not a party to the contract of his service or to his pledges.

(3) The States made the Constitution. It was a compromise between those in the Federal Convention who desired a strictly national government and those who strove for a purely federal union. The representation in the Senate was the result of the demand (an ultimatum) on the part of the smaller States, inasmuch as representation in the House of Representatives was to be proportionate to population, that in the Senate the States as such were to be represented. They were to be the units of representation. The State, as a political organization, is not represented by the legislature any more than it would be by the Judicial Department of the Government or the Executive. The ultimate sovereignty of the State rests alone with the people or with their accredited chosen representatives in convention assembled.

Surely, then, the creature (the legislature) is not the equal of the creator (the sovereign people), while the State, as a political organization, is more fitly represented by the sovereign power of the State than by one of the mere creatures of its sovereignty, and the plan proposed preserves the State as the unit of representation in the Senate, and at the same time leaves the choice to the people, who are the sovereign power in the State.

(4) It is the duty of the legislature of each State, by law, to lay off the legislative districts in the State. Under the present mode of election of Senators, the legislatures may be induced to make an unfair apportionment, and lay off unequal and unfair districts in order that the party temporarily in control in the legislature may reap the reward of the election of one of its partisans to the Senate and defeat the popular choice of the majority party in the State.

This system of gerrymandering a State is notorious, and the disposition to adopt it seems to be on the increase in many of the States. This

evil would be greatly modified by the adoption of the proposed amendment.

(5) State and Federal affairs should, as far as possible, be kept distinct and separate for the purity of each and the betterment of both. The administration of the local affairs of the people, in the protection of their personal and property rights and the maintenance of peace and good order in society, has most properly been reserved by the States to themselves. The point of contact, in our system of government, with the people, where personal rights are to be protected and the home guarded, is for the most part (as it ought to be entirely) with the State or local government. To the State legislatures, the law-making power of the several States, the people look to redress their local wrongs and protect their local rights.

These same legislatures, under the present system, possess the electoral function in the selection of Senators. The money which corrupts, by purchase, the member of the legislature for Senatorial elections has debauched him as a servant of the people he is sworn to serve in local legislation. The corporation that can enter the halls of a legislature and lay its unholy hands upon the members, claiming them as its own in the selection of a Senator, has already destroyed the hope of a pure administration of the local affairs of the people of that State by polluting the source from which such administration is derived. Under the specious guise of interest merely in the Senatorial election, legislatures are debauched and the purchased member in the Senatorial election can hardly pose as the *unbought* and *unpurchasable* tribune of the people's local rights. If the charges of corruption in Senatorial elections are true, the reflex action on the legislation in the States, incident to such corruption, must be immeasurable in its destruction of the rights and liberties of the people of the States.

II.

It is provided that such elections shall be held at the times, places, and in the manner as prescribed by the legislatures of the States.

(1) Corporate interference in the election of Senators and the corrupt use of money, as openly charged in the public press of the country and believed by many, have finally crystallized public sentiment in favor of the election of Senators free from any outside influence, whether it be *corporate*, *individual*, or *governmental*.

(2) This clause simply guarantees that the States shall elect their Senators in their own way, as to them may seem proper, without Federal supervision, as they have been elected since the foundation of the Government; for no attempt has ever been made in the history of the Government to apply Federal supervision to the election of Senators.

(3) If a condition of things could be imagined when it would be both constitutional and proper to apply Federal authority to the election of Representatives in Congress, we submit that its application to the election of representatives of sovereign States (Senators)—the units of constitutional organization—is a very different proposition.

III.

Where vacancies occur the executive of the State shall direct writs to issue for holding the election by the people to fill the vacancies; or, by law, the legislature may empower the executive to fill the same temporarily until an election can be had.

Under this clause the governor must order an election to fill the vacancy that has occurred. This preserves the principle of election by the people. In some States, however, in which there are annual elections, this would be a hardship, for the vacancy would in most cases not be of long duration, and to add another State election would be imposing an unnecessary expense on the people, so that the proviso was thought to be wise by which the governor may be empowered to fill the vacancy "until the people fill the vacancy by election, as the legislature may direct."

Under this provision in a State where there are biennial elections the legislature might direct that if a vacancy occurred within a year [or any other period it might fix] after the election, the vacancy should be filled by an election by the people; but if the vacancy occurred more than a year after the election the vacancy should be filled by executive appointment. This optional feature in the filling of vacancies was as far as your committee deemed it prudent to go in this direction.

IV.

That the title of no Senator may be affected who at the time of the adoption of the amendment holds his seat at the hands of the legislature of his State as now provided by the Constitution, the last provision is inserted out of abundant caution.

Finally, we submit this amendment, not in the belief that it is a cure for all the evils complained of by the people, but with confidence that it will eradicate many such evils and will have a healthful tendency to check the increase of others. That better men will *in all cases* be selected we do not claim or hope for, but the wholesome influence on political parties of the knowledge that from the nominating convention the appeal will be made direct to the people for their suffrages, none will deny; and the bribe-giver and the corruptionist will not dare to face the scorn of an enlightened constituency, even though by intrigue and fraud he could compass his nomination in convention.

ELECTION OF UNITED STATES SENATORS.

FEBRUARY 16, 1892.—Referred to the House Calendar and ordered to be printed.

Mr. BUSHNELL, from the Select Committee on Election of President and Vice-President and Senators and Representatives in Congress, submitted the following as the

VIEWS OF THE MINORITY.

[To accompany H. Res. 90.]

The amendment proposed by the committee would *compel* every State to elect their United States Senators by a direct vote of the people. Such an amendment we believe much less likely to be adopted by a two-thirds vote of the two Houses of Congress and the legislatures of three-fourths of the States, than one which will leave each State free to make choice between this method and the present method of electing Senators by the State legislatures. All desirable reforms ought to advance along the lines upon which they will meet with the least resistance.

The purpose of this minority of the committee is to report a constitutional amendment that will *permit* the election of United States Senators by direct vote of the people, when the people of any State shall so desire, and not *compel* any State to do so, if they prefer to retain the present method.

To that end, they recommend as a substitute for the resolution reported by the majority of the committee, the adoption of the following:

JOINT RESOLUTION proposing an amendment to the Constitution so as to permit the choosing of United States Senators by a direct vote of the people when any State shall so prefer.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That this Fifty-second Congress hereby proposes to the legislatures of the several States the following amendment to the Constitution of these United States, in addition to the existing provisions thereof, as to the manner of choosing United States Senators and filling Senatorial vacancies, that is to say:

Add at the end of the first paragraph of section 3, of article I, the words, "*Provided*, That such Senators may be elected by a direct vote of all of the electors of any State qualified to vote for members of the most numerous branch of the State legislature, whenever such State shall, by law, so provide; and when so elected a plurality shall elect, and if vacancies happen the executive of the State may make temporary appointments until an election can be held for the rest of the term," so that as amended said paragraph will read as follows:

"The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote: *Provided*, That such Senators may be elected by a direct vote of all of the electors of any State qualified to vote for members of the most numerous branch of the State legislature, whenever such State shall by law so provide; and when so elected a plurality shall elect, and if vacancies happen the executive of the State may make temporary appointments until an election can be held for the rest of the term."

Upon the adoption of this resolution the President shall cause the same to be submitted to the legislatures of the several States, as soon as may be, for their ratification or rejection; and if ratified by three-fourths of such legislatures, the same shall be of full force and effect, and the President shall make due proclamation thereof.

This would leave the people of every State free to provide, by constitutional or legislative enactment, for the election of their United States Senators by a direct vote of the people, if they so desired, and do nothing else.

There is an increasing sentiment in favor of the election of United States Senators directly by the people. Some of the reasons for it are:

(1) It is generally believed, whether true or false, that in some States, United States Senators have been elected by the bribery and corruption of members of the legislatures electing them; and that thereby men have gained seats in the Senate of the United States, whom the people of their State would never have chosen to go there, and who never would have gone there, but for the corrupt use of money to secure their election.

Yet, seldom has an investigation been had by that body, as to the methods used by any Senator to secure his election. There is a growing tendency toward Senators becoming representatives in that body, of their own wealth, or the wealth that placed them there, rather than of the people of their State. This high office ought to be the people's reward for great public services rendered, noble patriotism, high ability, and true statesmanship, and not a means of profit, or the prize of the highest bidder.

(2) It will do away with the legislative gerrymandering of the States to secure the election of United States Senators, by the party happening to be in power when each new apportionment is made. That this has long been the common practice, no fair-minded, intelligent man will deny. That it will continue, until the temptation to it is removed, or our fundamental law otherwise changed, is to be reasonably expected. The law of retaliation, to some extent, will always be applied.

The gerrymandering, used by a struggling people who have at last come into power, to break the bonds imposed on them by its use, creates no surprise, and little just recrimination.

(3) Our Government ought to be made more sensitive to the will of the people. It is now less so than are some constitutional monarchies.

Some of the framers of our Constitution sought to guard against what they thought might prove too great power in the hands of the people. They were afraid of trusting them too far. The republic was an experiment. There was some leaning toward monarchism. They provided safeguards against what they feared might be the impulsive, inconsiderate, and unreasonable demands of the uneducated masses of the people, and sought to prevent too sudden changes of policy in the administration of the government.

They fixed the presidential term at four years, and provided for the election of the President, not directly by a vote of the people, but by an electoral college. They fixed the senatorial term at six years, and required Senators to be elected, not by a direct vote of the people, but by the State legislatures. They made the term of Representatives in Congress two years; and a little later, it was provided that this House of Congress, which stands nearest to the people, and is the most responsive to their will, should not meet and begin to have a voice in the making of our laws or as to any matter of public policy, for more than a year after their election; and when met, they are powerless to change

any law, or enact a new one, without the consent of the Senate and President.

For a hundred years, this distrust of the people, as embodied in our national Constitution, has stood congealed, fixed, and immovable.

The cause of free government, in the several States, has steadily advanced, until now, in the best governed among them, the will of the intelligent masses of the people, is truly sovereign.

The idea that all governments derive "their just powers from the consent of the governed;" that the will of the people shall rule; upon which the fathers of the Republic, cautiously and fearingly, founded our government, exemplified and expanded, tried, tested and not found wanting, as it has been in the several States, has spread triumphant over the whole western hemisphere. It has crossed the Atlantic, and swept over Europe. Thrones have crumbled before it, and out of their wrecks, or upon their ruins, have been builded governments whose administration is immediately responsible and responsive, to the will of the people, through their elected lawmakers.

And wherever, among the civilized nations of the earth, the true sovereignty of the people is denied, or sought to be abridged or suppressed, may be observed the ominous mutterings of discontent, constant dread of nihilistic bombs, signs of socialistic upheaval, or the earnest voice of protest and respectful prayer for relief, which those charged with the execution of the sovereign will, of right, servants, and not masters of the people, will do well to heed.

The right given to elect United States Senators by a direct vote of the people, will be a step in advance for the great Republic; a step toward making our national Government more directly responsible, and more quickly responsive, to the will of the people. It is but a short step in that direction. We owe it to ourselves, we owe it to the world, to take at least that constitutional step.

A. R. BUSHNELL,
R. E. DOAN.

61ST CONGRESS, 3d Session. | SENATE. | REPORT No. 961.

ELECTION OF SENATORS BY POPULAR VOTE.

JANUARY 11, 1911.—Ordered to be printed.

Mr. BORAH, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany S. J. Res. 134.]

A joint resolution for the amendment of the Constitution of the United States for the election of Senators by popular vote was referred to the committee.

The joint resolution which has been referred back favorably by the committee is as follows:

JOINT RESOLUTION Proposing an amendment to the Constitution providing that Senators shall be elected by the people of the several States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That in lieu of the first paragraph of section three of Article One of the Constitution of the United States, and in lieu of so much of paragraph two of the same section as relates to the filling of vacancies, and in lieu of all of paragraph one of section four of said Article One, in so far as the same relates to any authority in Congress to make or alter regulations as to the times or manner of holding elections for Senators, the following be proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the States:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

"The times, places, and manner of holding elections for Senators shall be as prescribed in each State by the legislature thereof.

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the legislature may direct.

"This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

II.

The first draft of the Constitution submitted to the Constitutional Convention of 1787 by Edmund Randolph provided as follows:

Resolved, That members of the second branch of the national legislature ought to be elected by those of the first out of a proper number of persons nominated by the individual legislators, etc.

The draft of the Constitution submitted by Mr. Pinckney was practically the same, to wit:

The Senate shall be elected and chosen by the house of delegates.

The draft submitted by Mr. Hamilton provided as follows:

The Senate to consist of persons elected to serve during good behavior; their elections to be made by electors chosen for that purpose by the people. In order to do this the States to be divided into election districts.

The 11 propositions submitted by Mr. Patterson do not seem to have covered the subject at all; in fact Mr. Patterson's scheme was really to strengthen the old confederation.

Gouverneur Morris proposed that the Senators be appointed by the President to serve for life and without compensation.

Mr. Wilson of Pennsylvania urged that the election of Senators be made by the people.

The vote was taken on the election by the lower branch of the legislature and was lost. Dickinson afterwards moved that they be elected or chosen by the individual legislators. A substitute was offered for this referring the election to the people. The substitute was defeated and the method of choosing through the State legislatures was thereupon adopted.

III.

One can not in reading the proceedings and debates of the convention fail to notice the limited amount of discussion on the subject of the mode or manner of electing Senators. Some of the reasons urged in the debate would certainly not avail at this time, and would not under present conditions and after a century of experience in the rule of the people be advanced by anyone. Gouverneur Morris thought it desirable that the Senate be made up of men of great and established wealth, that thus they might keep down the "turbulency of democracy."

Roger Sherman said:

The people immediately should have as little to do as may be about the Government. They lack information and are constantly liable to be misled.

Mr. Gerry said:

The evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots.

Mr. Dickinson states that the Senate should bear as strong a resemblance to the House of Lords of England as possible.

It is a noticeable fact that almost all parties who opposed the election of Senators by popular vote or by the people also opposed the election of Representatives by the people, and assign almost the same reasons.

These fears were not unnatural at that time, and especially in view of the experience of history and our own experience under the Confederation.

Mr. Wilson of Pennsylvania was the strongest advocate and practically the sole advocate in the convention of the election of Senators by popular vote. He said among other things:

If we are to establish a national government, the government ought to flow from the people at large. * * * I wish the Senate to be elected by the people as well as the other branch.

We ought not to overlook, either, a statement by Mr. Madison, although we do not contend that he advocated election of Senators by popular vote.

The great fabric to be raised would be more stable and durable if it should rest upon the solid foundation of the people themselves rather than if it should stand merely on the pillars of the legislature.

IV.

We do not find any discussion whatever in the State conventions which ratified the Constitution on the mode of electing Senators. It was only referred to once or twice incidentally and seems not to have received any serious or extended discussion at any time. Neither was it discussed in the current literature of the day to any great extent. It was referred to in the Federalist by Mr. Hamilton (No. XXVII), and also by Mr. Hamilton or Mr. Madison in No. LXII.

In the last number of the Federalist referred to we find this paragraph:

It is equally unnecessary to dilate on the appointment of Senators by the State legislatures. Among the various modes which might have been devised for constituting this branch of the Government, that which has been proposed by the convention is probably the most congenial with public opinion. It is recommended by the double advantage of favoring a select appointment and of giving to the State governments such an agency in the formation of the Federal Government as must secure the authority of the former and may form a convenient link between the two systems.

Nothing less could have been said upon the subject if the subject was to be referred to at all.

It is proper to take into consideration the condition of affairs with reference to popular voting at the time of the formation of the Constitution. Very few of the States gave to their citizens the unqualified right to vote and very few allowed the people the right to elect any considerable number of officials. Most of the offices in the State were filled by appointment, some by the legislature, some by the chief executive. For a number of years the legislature had been practically a gathering of the people, that is to say, the body through which they acted in sundry matters not strictly legislative. A vast change has taken place since then. At the present time practically all the officers from precinct officer to the President are elected, with certain exceptions as to the judiciary. The President, in view of the function now performed by the electors, is in reality elected by popular vote. Manhood suffrage has everywhere become general and practically unqualified.

We do not cite these historic facts for the purpose of in any way seeking to impeach or criticize the remarkable men who framed our Constitution. In the science of government none have ever excelled the men who gathered at Philadelphia for the great task of 1787. The general principles of government which they announced and incorporated into the charter few indeed would challenge. But in the mechanism or machinery by which those general principles are applied from decade to decade, or century to century, there may

arise the necessity of change. The economic, social, and industrial changes which have taken place since the present method of electing Senators was established seem to require a reconsideration of the method; not for the purpose of changing the fundamental principles of our Government, but for the purpose of maintaining the very principles which the fathers sought to establish.

V.

It has been urged that if the method of electing Senators is changed then we must be prepared to consider the proposition of a change with reference to the equal representation in the Senate. It is said that the older States and the more populous States will not long submit to equal representation if the old method of electing Senators is disposed of through amendment. The method or mode of electing Senators had nothing to do in the convention with the question of equal representation in the Senate by the States. The compromise which was effected between the large States and the small States with reference to representation was not influenced one way or the other by the mode of electing Senators. Had the fathers seen fit to say that the Senators should be elected by popular vote the compromise between the large and small States would have been precisely the same. It would still have been necessary, in order to frame the Constitution, to meet upon the basis upon which they did meet, to wit, equal representation in the Senate and proportionate representation in the House. A thorough search of the records of that date will not disclose that anyone contended that the method or mode of electing Senators was a part of the compromise between the large and the small States. There would be the same necessity and the same reason for equal representation after the adoption of this proposed amendment as before. The equal representation of the States can not be taken away without the consent of all the States. There is scarcely any danger of such a change. At least, if there is any such danger, it could neither be augmented nor retarded by a change in the mode of electing Senators.

VI.

It is also said that the change in the method of electing Senators will operate to change the nature of the organization of our Government and of the relations which the States bear to the Federal Union and of the relations which the Senators bear to the States and to the people thereof. It was undoubtedly in the minds of the fathers that the Senators should in a peculiar sense represent the State something as an ambassador. That idea naturally arose out of the fact that the States had been separate and independent sovereignties, and regarded each other to a great extent as wholly independent States. But that condition has been modified both in fact and as a theory. The Senators of a State would be just as thoroughly representative of the State if elected by the people as they are when elected by the legislature. In what possible way could the mode of choosing Senators change his relations to the State or people thereof? It might change his relations to certain interests and certain forces within the State, but if we are to suppose that a State consists of all the people and of

all the interests, will he not still be its representative in every sense when his election comes from all the people of his State?

This amendment does not propose in any way to interfere with the fundamental law save and except the method or mode of choosing the Senators. It will still be the duty of the Senator to see that the States respectively are not denied any of the rights to which they are justly entitled under our system of government. It will still be the duty and the pride of the Senator to see that the Commonwealth which he represents in its entirety has that full representation to which it is entitled under the fundamental law. The change will consist in bringing him more thoroughly in touch with all the interests and all that makes up a great State, and that is certainly desired.

VII.

There is much force in the argument that the framework of our Government should be changed only after long deliberation and consideration. The fathers exhibited no greater wisdom than when they provided against sudden changes of the framework of the Government. But in proposing this amendment, we are proposing a proposition which has been up for discussion for at least three quarters of a century. Certainly no complaint can be had at this time as to haste or lack of consideration. Aside from the proposition that Mr. Wilson urged the matter in the Convention of 1787, as early as 1826 a resolution was submitted in Congress looking to this change in the method of electing Senators. The subject has been before Congress session after session. It has met the approval of the first branch of Congress many times. It has received serious discussion here upon different occasions by some of the ablest men who have occupied seats in the Senate. At least 31 States have declared in favor of the amendment or the principle. It has been the subject of years of discussion of editors and publishers. Literature on the subject is very extensive, and now, after so long a period of discussion and consideration, the earnest, sober, second thought of the people, upon which the fathers relied so implicitly, is greatly in its favor. May not we trust ourselves to trust that wisdom? Is it not well to preserve in the form of an amendment to the Constitution, the public opinion so long in forming and so persistently maintained?

In order that those who may care to go further into the literature of these years than this report can do, there is placed in the report the following list of speeches and articles and reports touching the subject:

Ames, Herman V. The proposed amendments to the Constitution of the United States during the first century of its history. (In American Historical Association. Annual report for the year 1896, Vol. II. Washington, 1897. 442 pp. 8°.) Popular Election of Senators, pp. 21, 60-63.

Bailey, Joseph W. Election of United States Senators. Remarks, May 9, 1902. (In Congressional Record; vol. 35, pt. 5, pp. 5205-5210.) Favors popular election.

——— Same. Remarks, June 11, 1902. (In Congressional Record, vol. 35, pt. 7, p. 6591.) Favors popular election.

Barkworth, T. E. Should United States Senators be elected by the people. With discussion by A. C. McLaughlin, E. V. Robinson, R. A. Hinsdale, H. C. Adams, and D. B. Waldo. (In Michigan Political Science Association. Publications, vol. 1, May, 1893, pp. 78-97.)

Barney, Samuel S. Election of Senators by the people. Speech, May 11, 1898. (In Congressional Record, vol. 31, pt. 8, Appendix, pp. 441-442.) Favors popular election.

Bartlett, Franklin. Election of United States Senators by the people. Remarks, July 20, 1894. (In Congressional Record, vol. 26, pt. 8, 7773–7774.) Against popular election.

Berry, James H. Election of Senators by direct vote. Remarks, March 11, 1902. (In Congressional Record, vol. 35, pt. 3, pp. 2615–2617.) Favors popular election.

——— Same. Speech, May 9, 1902. (In Congressional Record, vol. 35, pt. 5, pp. 5203–5204, 5207, 5208.) Favors popular election.

——— Same. Remarks, June 11, 1902. (In Congressional Record, vol. 35, pt. 7, pp. 6588, 6590, 6593–6596.) Favors popular election.

Blackburn, J. C. S. Election of United States Senators. Remarks, April 11, 1902. (In Congressional Record, vol. 35, pt. 4, pp. 3984–3987.) Favors popular election.

——— Same. Remarks, May 9, 1902. (In Congressional Record, vol. 35, pt. 5, pp. 5205–5206.) Favors popular election.

——— Same. Remarks, June 11, 1902. (In Congressional Record, vol. 35, pt. 7, pp. 6593–6595.) Favors popular election.

Boutell, Lewis Henry. Roger Sherman in the Federal Convention. (In American Historical Association. Annual report, 1893, pp. 229–247.) Also printed as U. S. 53d Congress, 2d session. Senate Miscellaneous Document No. 104.

Breazeale, Phanor. Election of United States Senators. Remarks, April 12, 1900. (In Congressional Record, vol. 33, pt. 5, pp. 4118–4119.) Favors popular election.

Bryan, William J. Election of United States Senators by the people. Remarks, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, pp. 6071, 6072.) Favors popular election.

——— Same. Remarks, July 20, 1894. (In Congressional Record, vol. 26, pt. 8, pp. 7775–7777.) Favors popular election.

Burgess, John W. The election of United States Senators by popular vote. (In Political Science Quarterly, vol. 17, Dec., 1902, pp. 650–663.)

Burrows, Julius C. Election of Senators by direct vote. Remarks, March 11, 1902. (In Congressional Record, vol. 35, pt. 3, p. 2616.) Favors popular election.

——— Same. Remarks, May 9, 1902. (In Congressional Record, vol. 35, pt. 5, p. 5204.) Favors popular election.

——— Same. Election of United States Senators. Remarks, June 11, 1902. (In Congressional Record, vol. 35, pt. 7, pp. 6593, 6594.) Favors popular election.

Bushnell, A. R. Election of United States Senators by the people. Speech, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, pp. 6066–6067.) Favors popular election.

Capron, Adin B. Election of Senators by the people. Remarks, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, pp. 4812, 4815.) Favors popular election.

Chandler, William E. Election of Senators by the people. Speech, April 12, 1892. (In Congressional Record, vol. 23, pt. 4, pp. 3191–3201.) Unfavorable to popular election.

——— Election of Senators by direct vote. Speech, June 5, 1896. (In Congressional Record, vol. 28, pt. 7, pp. 6157–6159, 6160.) Against popular election.

——— Election of Senator by popular vote. (In The Independent, vol. 52, May 31, 1900, p. 1292.) Unfavorable.

Chipman, J. Logan. Election of United States Senators by the people. Remarks, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, pp. 6060, 6078.) Favors popular election.

Clapp, Moses E. Election of United States Senators. Speech, June 11, 1902. (In Congressional Record, vol. 35, pt. 7, pp. 6590–6593, 6596.) Favors popular election.

Clark, E. P. Electing Senators by popular vote. (In The Nation, vol. 74, Mar. 20, 1902, p. 222.)

Clark, Walter. The election of Senators and the President by popular vote, and the veto power. (In The Arena, vol. 10, Sept., 1894, pp. 451–461.) Favorable.

——— The election of United States Senators by the people. (In Green Bag, vol. 10, Jan., 1898, pp. 4–6.) Strongly favorable.

Corliss, J. B. Election of Senators by the people. Speech, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, pp. 4809–4812.) Favors popular election.

Corliss, J. B. Election of United States Senators. Speech, April 12, 1900. (In Congressional Record, vol. 33, pt. 5, pp. 4109-4111.) Favors popular election.

——— Same. Remarks, February 13, 1902. (In Congressional Record, vol. 35, pt. 2, pp. 1721, 1722.)

Crane, Condit. In the seats of the mighty. (In The Outlook, vol. 61, Jan. 7, 1899, pp. 27-34.) Unfavorable to popular election of Senators.

Cummings, Amos J. Election of United States Senators by the people. Remarks, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, p. 6076.) Favors popular election.

——— Election of Senators by the people. Remarks, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, p. 4815.) Favors popular elections.

De Armond, D. A. Election of United States Senators by the people. Remarks, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, pp. 6077-6078.) Favors popular election.

——— Same. Speech, July 19, 1894. (In Congressional Record, vol. 26, pt. 8, pp. 7724-7727.)

De Forest, Robert E. Election of United States Senators by the people. Speech, July 20, 1894. (In Congressional Record, vol. 26, pt. 8, pp. 7771-7773.) Favors popular election.

Depew, Chauncey M. Election of United States Senators. Remarks [submitting amendment], April 10, 1902. (In Congressional Record, vol. 35, pt. 4, pp. 3925-3926.) Against popular election.

——— Election of United States Senators. Speech, April 11, 1902. (In Congressional Record, vol. 35, pt. 4, pp. 3979-3981, 3987.) Against popular election.

——— Election of United States Senators. Remarks, May 9, 1902. (In Congressional Record, vol. 35, pt. 5, pp. 5205-5208.) Against popular election.

Dickinson, John. The letters of Fabius in 1788, on the Federal Constitution * * * with additional notes. (In his Political Writings, vol. 2, pp. 67-165. Wilmington [Del.], 1801. 8°.) Defends the method of election and compensation of the Senate under the provisions of the Constitution.

Direct election of Senators. (In The American Monthly Review of Reviews, vol. 26, Dec., 1902, pp. 644-645.)

Direct election of Senators. (In The Independent, vol. 54, July 10, 1902, pp. 1672-1674.)

Doan, Robert E. Election of United States Senators by the people. Remarks, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, pp. 6069-6070.) Favors popular election.

Dockery, A. M. Election of Senators by the people. Remarks, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, p. 4819.) Favors popular election.

Dubois, F. T. Election of Senators by direct vote. Remarks, March 11, 1902. (In Congressional Record, vol. 35, pt. 3, p. 2617.) Favors popular election.

Dungan, Irvine. Election of United States Senators by the people. Remarks, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, pp. 6075-6076.) Against popular election.

Edmunds, George F. Should Senators be elected by the people? (In The Forum, vol. 18, Nov., 1894, pp. 270-278.) Unfavorable.

The Election of Senators. (In Public Opinion, vol. 12, Feb. 20, 1892, p. 560; Feb. 27, 1892, p. 524.) Press comments.

The Election of Senators. (In Public Opinion, vol. 14, Jan. 28, 1893, pp. 391-393.) Quotations from press. Favorable.

The Election of Senators. (In Public Opinion, vol. 15, Apr. 15, 1893, p. 46.) Press comments.

The Election of Senators by popular vote. (In The Independent, vol. 55, Jan. 8, 1903, pp. 106-107.)

Election of Senators. Press comment. (In Public Opinion, vol. 28, Apr. 26, 1900, pp. 516-518.) Favors popular election.

Everett, William. Election of United States Senators by the people. Remarks, July 20, 1894. (In Congressional Record, vol. 26, pt. 8, pp. 7776-7777.) Against popular election.

The Federalist. Edited by Henry Cabot Lodge. New York & London, G. P. Putnam's Sons, 1888. xlv (l), 586 pp. 8°. Election of Senators by State legislatures, etc., pp. 160, 385-386. It has not been thought necessary to note here all the editions of the Federalist. The various editions are described in P. L. Ford's Bibliography of the Constitution.

Flagg, John H. The choice of United States Senators. (In New England Magazine, n. s., vol. 14, Apr., 1896, pp. 190-194.)

Foraker, Joseph B. Election of United States Senators. Remarks, May 9, 1902. (In Congressional Record, vol. 35, pt. 5, pp. 5205, 5208, 5209.) Against popular election.

——— Same. Remarks, June 11, 1902. (In Congressional Record, vol. 35, pt. 7, pp. 6594, 6595.) Against popular election.

Fox, C. F. Popular election of United States Senators. (In The Arena, vol. 27, May, 1902, pp. 455–467.)

Gantz, Martin K. Election of United States Senators by the people. Remarks, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, pp. 6067-6069.) Favors popular election.

Garrison, Wendell Phillips. Popular elections of Senators. (In The Nation, vol. 54, Jan. 21, 1892, p. 44.) Favorable.

——— The reform of the Senate. (In The Atlantic Monthly, vol. 68, Aug., 1891, pp. 227–234.) Strongly favorable to popular election.

Griffin, Appleton Prentiss Clark, compiler. Debates in the Federal convention of 1787, held at Philadelphia, on the election of Senators. June 11, 1902. 14 pp. 8°. (U. S. 57th Cong., 1st sess. S. Doc. No. 404.)

——— Same. Reprinted in U. S. 57th Congress, 1st session. Senate Document No. 405, pages 23-36.

Grosvenor, Charles H. Election of Senators by the people. Speech, July 20, 1894. (In Congressional Record, vol. 26, pt. 10, appendix, pt. 2, p. 1352.) Against popular election.

——— Same. Remarks, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, pp. 4811, 4812.) Against popular election.

Hamilton, Alexander. Speech on the Senate of the United States. (In his Works, edited by Henry Cabot Lodge, vol. 1, pp. 448–496. New York, 1885. 8°.)

Harris, William A. The election of Senators by the people. (In The Independent, vol. 52, May 31, 1900, p. 1291.) Favorable. "He [the Senator] should be brought more closely in touch with the great masses of the people, who should have greater liberty of choice in his selection."

Hawley, Joseph R. Election of Senators by direct vote. Speech, June 5, 1896. (In Congressional Record, vol. 28, pt. 7, p. 6161.) Against popular election.

Haynes, John. Popular election of United States Senators. (In Johns Hopkins University studies in historical and political science, 11th series, Nov.–Dec., 1893, pp. 547–569.)

Henderson, David B. Election of United States Senators by the people. Remarks, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, p. 6076.) Favors popular election.

——— Same. Remarks, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, pp. 4814–4815.)

Hepburn, W. C. Election of United States Senators by the people. Remarks, July 20, 1894. (In Congressional Record, vol. 26, pt. 8, pp. 7777–7778.) Favors popular election.

Hoar, George Frisbie. The Connecticut compromise. Roger Sherman, the author of the plan of equal representation of the States in the Senate, and representation of the people in proportion to numbers in the House. Worcester, Mass.: Press of Charles Hamilton, 1903. 28 pp. 8°. Reprinted from the Proceedings of the American Antiquarian Society, October 21, 1902.

——— Election of Senators by direct vote of the people. Speech, April 3, 6, 7, 1893. (In Congressional Record, vol. 25, pt. 1, pp. 67, 97, 101–110.) Against popular election.

——— Same. Speech in the Senate April 6 and 7, 1893. Washington: [Government Printing Office], 1893. 30 pp. 8°. Reprinted from Congressional Record, vol. 25, pt. 1, pp. 101–110.

——— Election of Senators by direct vote. Remarks, March 11, 1902. (In Congressional Record, vol. 35, pt. 3, pp. 2616-2618.) Against popular election.

——— Election of United States Senators. Remarks, May 9, 1902. (In Congressional Record, vol. 35, pt. 5, pp. 5201-5209.) Against popular election.

——— Same. Remarks, June 11, 1902. (In Congressional Record, vol. 35, pt. 7, pp. 6590, 6593.) Against popular election.

——— The Senate. (In Youth's Companion, vol. 63, Nov. 13, 1890, p. 620.)

——— The Senate [a paper published in the Youth's Companion of November 13, 1890.] December 15, 1896, 9 pp. 8°. (U. S. 54th Cong., 2d sess. S. Doc. No. 20.)

Iowa. Legislature, 1904. Joint resolution for an application to the Congress of United States of America, in behalf of the State of Iowa, for the calling of a convention proposing amendments to the Constitution of the United States of America [for the election of United States Senators by a direct vote of the people], as provided in Article V of said Constitution. (In Congressional Record, vol. 38, Apr. 18, 1904, p. 5192.) Presented by Senator Dolliver.

Jones, William C. Election of Senators by the people. Speech, May 11, 1898. (In Congressional Record, vol. 31, pt. 8, appendix, pp. 456–458.) Favors popular election.

Kem, Omer M. Election of United States Senators by the people. Speech, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, pp. 6072–6075.) Favors popular election.

Kenny, John T. The legislature that elected Mr. Hanna. (In The Arena, vol. 21, Mar., 1899, pp. 311–326.) Favorable to popular election.

Kerr, Clara Hannah. The origin and development of the United States Senate. Ithaca, N. Y.: Andrus & Church, 1895. vi, 197 pp. 8°. Election of Senators, pp. 15–20.

King, Rufus. The life and correspondence of Rufus King, comprising his letters, private and official, his public documents, and his speeches. Edited by Charles R. King. New York: G. P. Putnam's Sons, 1894–1900. 6 vols. Portraits. 8°. Election of Senators, vol. 1, pp. 595–599, 607–612.

Kirkpatrick, William S. Election of Senators by the people. Speech, May 11, 1898. (In Congressional Record, vol. 31, pt. 8, Appendix, pp. 460–462.) Favors popular election.

Kluttz, Theodore F. Election of United States Senators. Remarks, April 12, 1900. (In Congressional Record, vol. 33, pt. 5, pp. 4113, 4117.) Favors popular election.

Lanham, S. W. T. Election of United States Senators by the people. Remarks, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, pp. 6070–6071.) Favors popular election.

Let us have popular election of Senators. (In The American Monthly Review of Reviews, vol. 27, April, 1903, pp. 400–401.)

Lloyd, James T. Election of United States Senators. Remarks, April 12, 1900. (In Congressional Record, vol. 33, pt. 5, pp. 4122–4123.) Favors popular election.

McComas, Louis E. Election of United States Senators. Remarks, June 11, 1902. (In Congressional Record, vol. 35, pt. 7, p. 6595.) Against popular election.

McDowell, John A. Election of Senators by the people. Speech, April 12, 1900. (In Congressional Record, vol. 33, pt. 8, Appendix, pp. 220–221.) Favors popular election.

McEttrick, Michael J. Election of United States Senators by the people. Speech, July 20, 1894. (In Congressional Record, vol. 26, pt. 8, pp. 7766–7770.) Favors popular election.

McEwan, T. Election of Senators by the people. Remarks, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, pp. 4817–4818.) Favors popular election.

McLaurin, Anselm J. Election of United States Senators. Remarks, April 11, 1902. (In Congressional Record, vol. 35, pt. 4, pp. 3983–3984.) Favors popular election.

Mason, George. Senate appointed by State assemblies. (In Rowland, K. M. Life of George Mason, vol. 2, pp. 117–118. New York, 1892. 8°.) Reprint of Mason's remarks reported in Madison's debates.

Maxey, Edwin. Election of United States Senators. (In his Some questions of larger politics, pp. 67–75. New York, 1901. 12°.) Reprinted from "Self-Culture Magazine, June, 1900."

Moyer, Ernst Christopher. Nominating systems; direct primaries versus conventions in the United States. Madison, Wis.: Published by the author, 1902. xx (2), 501 pp. 8°. "The popular election of United States Senators," pp. 448–451.

Milliken, Seth L. Election of United States Senators by the people. Speech, July 20, 1894. (In Congressional Record, vol. 26, pt. 8, pp. 7770–7771.) Against popular election.

Mitchell, John H. Election of Senators by the people. Remarks, February 18, 1892. (In Congressional Record, vol. 23, pt. 2, p. 1270.) Favors popular election.

——— Election of Senators by direct vote. Speech, June 5, 1896. (In Congressional Record, vol. 28, pt. 7, pp. 6151–6152, 6161–6162.) Favors popular election.

Mitchell, John H. Election of Senators by the people. Remarks, March 11, 1902. (In Congressional Record, vol. 35, pt. 3, p. 2616.) Favors popular election.

——— Election of Senators by popular vote. (In The Forum, vol. 21, June, 1896, pp. 385-397.) Favorable.

——— Election of United States Senators. Remarks, May 9, 1902. (In Congressional Record, vol. 35, pt. 5, pp. 5206, 5209.) Favors popular election.

Moffett, S. E. Is the Senate unfairly constituted? (In Political Science Quarterly, vol. 10, June, 1895, pp. 248-256.)

Money, H. De S. Election of United States Senators. Speech, April 11, 1902. (In Congressional Record, vol. 35, pt. 4, pp. 3976-3979, 3983.) Favors popular election.

Morgan, John T. Election of United States Senators. Remarks, May 9, 1902. (In Congressional Record, vol. 35, pt. 5, pp. 5209–5210.) Against popular election.

Muller, Nicholas. Election of Senators by the people. Speech, April 12, 1900. (In Congressional Record, vol. 33, pt. 8, appendix, pp. 199-200.) Favors popular election.

Nelson, Henry Loomis. Shall Senators be chosen by the people? (In Harper's Weekly, vol. 44, Feb. 3, 1900, p. 113.) Favorable.

Northway, Stephen A. Election of United States Senators by the people. Speech, July 20, 1894. (In Congressional Record, vol. 26, pt. 8, pp. 7763–7760, 7770.) Against popular election.

Nullifying the popular will. (In the Independent, vol. 55, Jan. 29, 1903, pp. 278–279.) Cites the deadlock in the Colorado Legislature as enforcing the argument for popular election.

Palmer, John M. Election of Senators by the people. Speech, February 18, 1892. (In Congressional Record, vol. 23, pt. 2, pp. 1267–1270.) Favors popular election.

——— Same. Remarks, April 12, 1892. (In Congressional Record, vol. 23, pt. 4, pp. 3201–3204.) Favors popular election.

——— Election of Senators by direct vote. Speech, June 5, 1896. (In Congressional Record, vol. 28, pt. 7, pp. 6159–6161.) Favors popular election.

Penrose, Boies. Election of Senators by direct vote. Submitted amendment, March 14, 1902. (In Congressional Record, vol. 35, pt. 3, p. 2772.) Against popular election.

Perkins, George C. Election of Senators by direct vote. Speech, June 5, 1896. (In Congressional Record, vol. 28, pt. 7, pp. 6152–6156.) Favors popular election.

Pettus, E. W. Election of United States Senators. Remarks, May 9, 1902. (In Congressional Record, vol. 35, pt. 5, pp. 5205, 5209.) Against popular election.

Platt, Orville H. Election of United States Senators. Remarks, June 11, 1902. (In Congressional Record, vol. 35, pt. 7, p. 6594.) Against popular election.

Popular election of Senators. (In Public Opinion, vol. 24, May 26, 1898, p. 647.) "Open and serious question."

Popular election of Senators. (In The Outlook, vol. 70, Mar. 22, 1902, p. 695.)

Powers, H. Henry. Election of United States Senators by the people. Speech, July 12, 1892. (In Congressional Record, vol. 23, pt. 8, appendix, pp. 602-601.) Favors popular election.

——— Election of Senators by the people. Remarks, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, pp. 4812–4814.) Favors popular election.

——— Election of United States Senators. Speech, April 12, 1900. (In Congressional Record, vol. 33, pt. 5, pp. 4112–4114.) Favors popular election.

Reed, Thomas B. Election of United States Senators by the people. Remarks, July 20, 1894. (In Congressional Record, vol. 26, pt. 8, p. 7777.) Against popular election.

Reform in Senatorial elections. (In the Arena, vol. 21, March, 1899, pp. 391-393.)

Representation in the United States Senate. (In the American Monthly Review of Reviews, vol. 27, Feb., 1903, pp. 219-220.)

Ridgely, E. R. Election of United States Senators by the people: Direct legislation and graduated tax. Speech, May 11, 1898. (In Congressional Record, vol. 31, pt. 8, appendix, pp. 690-695.) Favors popular election.

Robb, Edward. Election of United States Senators. Remarks, April 12, 1900. (In Congressional Record, vol. 33, pt. 5, pp. 4123–4124.) Favors popular election.

Rucker, W. W. Election of United States Senators. Remarks, April 12, 1900. (In Congressional Record, vol. 33, pt. 5, pp. 4109, 4110.) Favors popular election.

Russell, Alfred. Dissatisfaction with the Senate. (In Michigan Political Science Association. Publications, vol. 1, May, 1894, pp. 41-48.) Favors popular election.

Ryan, J. W. Election of United States Senators. Remarks, April 12, 1900. (In Congressional Record, vol. 33, pt. 5, pp. 4119-4121.) Favors popular election.

Scott, Owen. Election of United States Senators by the people. Remarks, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, pp. 6078-6079.)

Senatorial deadlocks. (In Public Opinion, vol. 26, Mar. 30, 1899, p. 388.) Favorable to popular election.

Senatorial elections. (In Public Opinion, vol. 30, Jan. 31, 1901, p. 133.)

Senators and legislatures. (In The Outlook, vol. 61, Feb. 4, 1899, p. 258.) Favorable to popular elections.

Shafroth, John F. Election of Senators by the people. Remarks, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, pp. 4818-4819, 4824.) Favors popular election.

Simpson, Jerry. Election of Senators by the people. Remarks, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, pp. 4816-4817.) Favors popular election.

Small, John M. Election of Senators by the people. Speech, April 12, 1900. (In Congressional Record, vol. 33, pt. 8; Appendix, pp. 314-317.) Favors popular election.

Spooner, John C. Election of United States Senators. Remarks, May 9, 1902. (In Congressional Record, vol. 35, pt. 5, pp. 5205, 5206, 5208.) Against popular election.

Stewart, William M. Election of Senators by direct vote. Speech, March 11, 1902. (In Congressional Record, vol. 35, pt. 3, pp. 2617-2618.) Against popular election.

Sulzer, William. Election of Senators by the people. Speech, May 11, 1898. (In Congressional Record, vol. 31, pt. 8; Appendix, pp. 451-452.) Favors popular election.

——— Election of United States Senators. Remarks, April 12, 1900. (In Congressional Record, vol. 33, pt. 5, p. 4121.) Favors popular election.

Todd, Albert M. Election of Senators by the people. Speech, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, pp. 4820-4824.) Favors popular election.

Tongue, Thomas H. Election of Senators by the people. Remarks, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, p. 4819.) Favors popular election.

Tucker, Henry St. George. Election of United States Senators by the people. Speech, July 12, 1892. (In Congressional Record, vol. 23, pt. 6, pp. 6060-6066.) General discussion, pp. 6066-6079.

——— Same. Speech, July 20, 1894. (In Congressional Record, vol. 26, pt. 10, appendix 2, pp. 1131-1136.) Favors popular election.

Turpie, David. Election of United States Senators by the people. Speech, Dec. 17, 1891. (In Congressional Record, vol. 23, pt. 1, pp. 76-80.) Favors popular election.

——— Same. Speech, December 6, 1894. (In Congressional Record, vol. 27, pt. 1, pp. 73-76.) Favors popular election.

——— Same. Speech, February 6, 1896. (In Congressional Record, vol. 28, pt. 2, pp. 1382-1385.) Favors popular election.

——— Election of Senators by direct vote. Speech, March 23, 1897. (In Congressional Record, vol. 30, pt. 1, pp. 169-173.) Favors popular election.

Underwood, Oscar W. Election of Senators by the people. Remarks, May 11, 1898. (In Congressional Record, vol. 31, pt. 5, p. 4811.) Favors popular election.

United States. 43d Congress, 1st session. Senate Miscellaneous Document No. 66. Resolution of the legislature of California in favor of an amendment to the Constitution of the United States, providing that Senators may be elected by a direct vote of the people. February 18, 1874. 1 p. 8°.

——— Senate Miscellaneous Document No. 69. Resolution of the legislature of Iowa, in favor of an amendment to the Constitution, providing for the election of United States Senators by a direct vote of the people. February 19, 1874. 1 p. 8°.

——— 52d Congress, 1st session. Senate Report No. 794. Part 1. Report by Mr. Chandler from the Committee on Privileges and Elections presenting a statement of his views adverse to the passage of the joint resolution (S. Res. 8) for submitting to the States an amendment of the Constitution providing for the election of United States Senators by direct vote of the people. June 8, 1892. 3 pp. 8°.

United States. 57th Congress, 1st session. Senate Report No. 794. Part 2. Views of the minority. Report by Mr. Mitchell [of the Committee on Privileges and Elections favoring the election of United States Senators by a direct vote of the people]. July 1, 1892. 11 pp. 8°.

——— Senate Miscellaneous Document No. 89. Resolution relative to choosing United States Senators. March 7, 1892. 1 p. 8°.

——— House Report No. 368. Election of Senators. Report by Mr. Tucker, from the Select Committee on the Election of President and Vice-President and Representatives in Congress. February 16, 1892. 5 p. 8° Reports favorably on the "Joint resolution proposing an amendment to the Constitution providing that Senators shall be elected by the people of the several States."

——— House Report No. 368. Part 2. Election of United States Senators. Views of the minority. Report by Mr. Bushnell, of the Select Committee on Election of President and Vice-President and Senators and Representatives in Congress. Feb. 16, 1892. 3 pp. 8°. The minority report proposes "a constitutional amendment that will permit the election of United States Senators by direct vote of the people when the people of any State *shall so desire, and not* compel any State to do so, if they prefer to retain the present method."

——— 53d Congress, 2d session. Senate Miscellaneous Document No. 97. Resolution providing for amendments to the Constitution regulating the election of President and Vice-President of the United States, and the election of United States Senators by a direct vote of the people. Feb. 22, 1894. 1 page. 8°.

——— House Report No. 944. Election of Senators by the people. Report by Mr. Tucker, from the Committee on Election of President and Vice-President and Representatives in Congress. May 22, 1894. 7 pp. 8°. Includes House Report No. 368, 52d Congress, 1st session. Favors popular election.

——— 53d Congress, 3d session. Senate Report No. 916. Views of the minority of the Committee on Privileges and Elections, favoring the election of United States Senators by direct vote of the people, presented by Mr. Turpie. Feb. 12, 1895. 3 pp. 8°. Proposes an amendment to the Constitution by which Senators shall be elected by direct vote of the people.

——— Senate Miscellaneous Document No. 1. Resolution relative to election of United States Senators by direct vote of the people. Dec. 3, 1894. 1 page. 8°.

——— 54th Congress, 1st session. Senate Report No. 530. Report by Mr. Mitchell, from the Committee on Privileges and Elections, to whom was referred "Joint resolution proposing an amendment to the Constitution of the United States providing for the election of Senators by the votes of the qualified electors of the States." March 20, 1896. 11 pp. 8°. Favors popular election.

——— Senate Report No. 530, part 2, Views of the minority, presented by Mr. Chandler. June 5, 1896. 3 pp. 8°. Against popular election.

——— House Report No. 994. Election of the United States Senators. Report by Mr. Corliss, from the Committee on Election of President, Vice President, and Representatives in Congress. March 30, 1896. 6 pp. 8°. "The object of this resolution is to place in the hands of the people of the respective States the right, if they so elect by constitutional or legislative enactment, to afford the people the privilege of expressing by direct vote their will in the election of a United States Senator." Views of the minority, pp. 5-6. Favors popular election.

——— 55th Congress, 2d session. House Report No. 125. Election of United States Senators. Report by Mr. Corliss, from the Committee on Election of President, Vice President, and Representatives in Congress. January 12, 1898. 6 pp. 8°. Favors popular election. Views of the minority, pp. 5-6.

——— 56th Congress, 1st session. House Report No. 88. Election of United States Senators. Report by Mr. Corliss, from the Committee on Election of President, Vice President, and Representatives in Congress. January 22, 1900. 6 pp. 8°.

United States. 56th Congress, 1st session. House Report No. 88. Part 2. Same. Views of the minority, presented by Mr. Rucker. February 7, 1900. 2 pp. 8°. The majority report favors making optional with the States "the privilege of expressing by direct vote their will in the election of a United States Senator." The minority report advocates a constitutional amendment requiring that Senators "shall be elected by a direct vote of the people thereof for a term of six years."

——— 57th Congress, 1st session. Senate Document No. 399. Election of United States Senators by the people. List of principal speeches and reports made in Congress in recent years upon the proposed change. June 9, 1902. 2 pp. 8°.

——— ——— Senate Document No. 406. Election of United States Senators by the people. List of principal speeches and reports made in Congress in recent years upon the proposed change in the method of electing Senators. Also, a reprint of principal documents relating to the subject of the election of United States Senators. Prepared in the Senate Library, by Clifford Warden. Washington: Government Printing Office, 1902. 36 pp. 8°. Cover-title. Contains reprints of the following documents: 52d Congress, 1st session. Senate Mis. Doc. No. 89; 53d Congress, special session. Senate Mis. Doc. No. 31; 53d Congress, 2d session. Senate Mis. Doc. No. 97; 53d Congress, 2d session. Senate Mis. Doc. No. 101; 53d Congress, 3d session. Senate Mis. Doc. No. 1; 54th Congress, 2d session. Senate Doc. No. 26; 57th Congress, 1st session. Senate Doc. No. 401.

——— ——— House Report No. 125. Election of United States Senators. Report by Mr. Corliss, from the Committee on Election of President, Vice President, and Representatives in Congress. January 21, 1902. 6 pp. 8°. Favors popular election.

Vest, George G. Election of United States Senators. Remarks, June 11, 1902. (In Congressional record, vol. 45, pt. 7, pp. 6595, 6596.) Against popular election.

Wilson, James. Speech on choosing the members of the Senate by electors; delivered on 31st December, 1789, in the convention of Pennsylvania, assembled for the purpose of reviewing, altering, and amending the constitution of the State. (In his Works, vol. 3, pp. 313–336. Philadelphia, 1804. 8°.)

Winchester, Boyd. The House and the election of Senators. (In The Arena, vol. 24, July, 1900, pp. 14–20.) Unfavorable.

Ziegler, Edward D. Election of United States Senators. Remarks, April 12, 1900. (In Congressional Record, vol. 33, pt. 5, pp. 4114–4117.) Favors popular elections.

VIII.

It is believed that one of the great advantages to be gained by a change of the mode of electing Senators is that of leaving the State legislatures free and unembarrassed to attend to that legislation which the interests of the State require. It is frequently true that a senatorial election not only pushes aside all matters of local interest, in so far as the election of members to the legislature is concerned, but that it also occupies not only weeks, but sometimes months, or the entire session of the legislature, to the great detriment of the State's public business. Not only is legislation which ought to be had not had, public interests which ought to be cared for are not cared for, but charges of bribery arise and scandal attaches to the entire lawmaking department of the State.

IX.

The popular election of Senators would secure regular and equal representation in the Senate. During the last 20 years some 15 or 16 contests in different States have been carried on with such bitterness that the body charged with the duty of electing Senators proves powerless to perform its office. In several instances special sessions of the

legislature for the sole purpose of filling vacancies have occurred. A number of States have acceded to vacancies, and thus have been deprived of their equal suffrage in the Senate. There would seem to be no reason why such a system should still be maintained in the face of the fact that long years of experience have shown that judgment and wisdom and cleanliness prevail on the part of the people in selecting by popular election their governors and other important officials. It seems wholly unnecessary, in view of the enormous powers reserved to the States, and of the enormous amount of work which they ought to do and which they must do in order to preserve the integrity of our institutions in the development of our industrial life, to burden the State with a method of election which poisons oftentimes the source of the State's legislative power, demoralizes it, and involves and embarrasses and humiliates the whole Commonwealth, when as a matter of fact all might be done without any practical possibility of corruption, delay, embarrassment, or demoralization. Have we not advanced far enough in democratic government to rest securely upon the judgment and wisdom of the individual voter in the selection of those who are to represent the interests of the State in the National Senate?

We do not care to enter upon a discussion of the instances of bribery and corruption which have taken place in the legislatures of the different States in the last 25 years, and which could not have occurred had popular elections prevailed. In this respect we may profitably place alongside the election of the governors of the different States that of the election of the Senators, and in this way test the cleanliness of the one system and the corruption at times of the other. No one contends for a moment that it is the universal practice or the general rule that legislatures are thus corrupted, but it must be admitted by all that if those who desire to corrupt enter the field at all it is after the legislature has convened. How often is it true that no taint of wrongdoing or corruption attaches to the election until the legislature has convened. The small number of parties to be controlled, the possibility of logrolling with different local interests, of trading this or that against votes, is tempting indeed to those who seek a senatorship, not upon merit, but through sinister means.

X.

It should not be overlooked either that the election of Senators by popular vote would not only leave the nomination and election of the members of the legislature upon the simple issue of their fitness for that particular work, but it would place every candidate for the high place of Senator before the people, where his views and his relationship to the public interests of the State could be known and understood of all. There is nothing more important in the matter of selecting public officers than of having the candidate take into his confidence those whom he is to represent prior to the time that the certificate of election is issued.

XI.

Finally, we believe that some deference ought to be paid to public opinion. Public or popular opinion has taken hold of the subject, and the demand for this change has been continued and persistent,

distinct, pronounced, and imperative; in fact, it is almost unanimous among the great mass of the people. To yield to this demand is not to yield to passion or impulse, to inconsiderate judgment hastily formed, but it is yielding to that species of public opinion characterized by deliberation and judgment which is the basis of our institutions and the groundwork upon which we build under our form of government. It can not be said, if our theory of government is correct, that the judgment of the people thus formed and built up through the long process of years is to go unheeded. The idea which once prevailed that the people act in haste and with passion and without judgment is no longer tenable in this age, in which the best literature of the land reaches almost every American home every morning, and in which the common citizen takes an interest almost commensurate with the leading public men of 100 years ago.

May we not safely say, therefore, that something is due to public opinion in this country of ours, and under our form of government? Will anyone doubt that in providing for the election of Senators by the legislatures the fathers largely acquiesced in the prevailing opinions and customs of that day, as reflected in the records of history of those days? Are we not safe in accepting the universal opinion of this day as reflected in this universal demand for a change?

ELECTION OF SENATORS BY THE PEOPLE.

APRIL 12, 1911.—Referred to the House Calendar and ordered to be printed.

Mr. RUCKER of Missouri, from the Committee on Election of President, Vice President, and Representatives in Congress, submitted the following

REPORT.

[To accompany H. J. Res. 39.]

The Committee on Election of President, Vice President, and Representatives in Congress, to which was referred the joint resolution (H. J. Res. 39) proposing an amendment to the Constitution of the United States authorizing the election of Senators by a direct vote of the people of the several States, having considered the same, beg to report said joint resolution back to the House with the recommendation that it do pass.

As the joint resolution reported is in the exact words of Senate Joint Resolution 134, reported from the Senate Committee on the Judiciary in the Sixty-first Congress by Mr. Borah, your committee adopts the able and exhaustive report there made, omitting some portions of same.

II.

The first draft of the Constitution submitted to the Constitutional Convention of 1787 by Edmund Randolph provided as follows:

"*Resolved*, That Members of the second branch of the National Legislature ought to be elected by those of the first out of a proper number of persons nominated by the individual legislators, etc."

The draft of the Constitution submitted by Mr. Pinckney was practically the same, to wit:

"The Senate shall be elected and chosen by the House of Delegates."

The draft submitted by Mr. Hamilton provided as follows:

"The Senate to consist of persons elected to serve during good behavior; their elections to be made by electors chosen for that purpose by the people. In order to do this the States to be divided into election districts."

The 11 propositions submitted by Mr. Patterson do not seem to have covered the subject at all; in fact, Mr. Patterson's scheme was really to strengthen the old confederation.

Gouvernour Morris proposed that the Senators be appointed by the President to serve for life and without compensation.

Mr. Wilson of Pennsylvania urged that the election of Senators be made by the people.

The vote was taken on the election by the lower branch of the legislature and was lost. Dickinson afterwards moved that they be elected or chosen by the individual legislators. A substitute was offered for this referring the election to the people. The substitute was defeated, and the method of choosing through the State legislatures was thereupon adopted.

Same as Senate Report No. 961 in 61st Congress 3rd Session

62D CONGRESS
2d Session

SENATE

DOCUMENT
No. 603

RESOLUTION FOR THE DIRECT ELECTION OF SENATORS

ARTICLE

BY

HON. JOSEPH L. BRISTOW

UNITED STATES SENATOR
FROM THE STATE OF KANSAS

PRESENTED BY MR. BORAH
MAY 15, 1912.—Ordered to be printed

WASHINGTON
1912

THE DIRECT ELECTION OF SENATORS.

By Senator JOSEPH L. BRISTOW.

The really historic incident of the first session of the Sixty-second Congress was not the passing of the reciprocity bill, the enactment of the corrupt-practices act, the tariff discussion, or the admission of two new States, but the passing by the Senate of the joint resolution providing for the election of Senators by direct vote. Many tariff bills have passed the Senate, and many States have been admitted to the Union, but it has taken more than 60 years of effort to induce the Senate to agree to give the people an opportunity to change the method of electing its Members.

The fight for the direct election of Senators has been long and interesting. Among the numerous compromises that were agreed to by the framers of the Constitution was one providing for the election of Senators by the State legislatures instead of choosing them by appointment or by a popular election. After the animosities growing out of the discussion and adoption of the Constitution had passed away, for almost half a century there appeared to be little dissatisfaction with the method provided for the election of Senators. It was not until 1826 that any action was taken in Congress looking to a change in this provision of the Constitution. During that year Mr. Storrs, a Congressman from the State of New York, introduced a resolution providing for an amendment to the Constitution making Senators elective by a direct vote of the people. And since that date there has been a growing demand for such a change in our Constitution.

Mr. Storrs's effort was followed by the introduction of a similar resolution by Mr. Wright, of Ohio, on February 19, 1829. This resolution limited the senatorial term to four years. Six years afterward, in 1835, another resolution similar to that presented by Mr. Storrs was introduced, but no serious consideration was ever given to any of these resolutions. As time went on, however, the sentiment in favor of the direct election of Senators grew; and between 1850 and 1855 there were at least five such resolutions introduced in the lower House of Congress. None of them was ever reported from the committees to which they were referred.

The first resolution introduced in the Senate providing for a change in the method of electing Senators was presented on January 14, 1850, by Senator Clemens, of Alabama. It is interesting to note that the most ardent advocate of changing the method of choosing Senators, from election by the State legislatures to that of a direct vote of the people, was Andrew Johnson, of Tennessee. While a Member of the House of Representatives he introduced two resolutions providing for this change in the Constitution; and in 1860,

when a member of the Senate, he renewed the agitation. In 1868, when President of the United States, he sent a special message to Congress advocating the measure, and he repeated the same recommendations in his annual message. Johnson was the advocate not only of the direct election of Senators, but also of abolishing the electoral college and electing Presidents by a direct vote. If it had not been for the tragedies of the Civil War, which absorbed the attention of the public for so many years and which completely changed the course of Johnson's life, he might have accomplished more than he did in enlarging this democratic principle in our national affairs.

From the effort which Johnson made in 1860 there seems to have been no interest taken in the matter in the Senate until 1873. On January 31 of that year Mr. Harlan, of Iowa, introduced a resolution providing for the direct election of Senators, and in December of the same year Mr. Windom, of Minnesota, presented another. Both of these resolutions were referred to the Committee on Privileges and Elections, but never reported from the committee. In 1876 Mr. Wright, of Iowa, introduced another resolution, which was referred to the same committee, with a like result. The matter was then permitted to sleep for 10 years, when Senator Van Wyck, of Nebraska, introduced a resolution—December 16, 1886—which was referred to the Committee on Judiciary, but never reported. In 1888 Mr. Mitchell, of Oregon, introduced another resolution, which was referred to the Committee on Privileges and Elections, and met the fate of all that had preceded it.

The House of Representatives of the Fifty-second and Fifty-third Congresses passed resolutions providing for the direct election of Senators. These resolutions, when they reached the Senate, were referred to the Committee on Privileges and Elections, but none was reported until the third session of the Fifty-third Congress, when the committee reported one of the resolutions adversely. During the first session of the Fifty-fourth Congress there was a favorable report from the committee on a resolution that had passed the House of Representatives, but no action was taken by the Senate. Again, a resolution passed the House on May 11, 1898, by a vote of 185 to 11, but in the Senate it likewise met the fate of all that had preceded it.

On April 13, 1900, a resolution again passed the House by a vote of 240 to 15. When it reached the Senate it was referred to the Committee on Privileges and Elections, but never emerged from the committee room. Again, on February 13, 1902, the House passed a resolution by a practically unanimous vote, there being no division; but it, too, was buried in the Senate committee room. It will be noticed that the Senate itself has been the barrier that for over half a century has blocked the movement for the direct election of Senators. This year, for the first time, that barrier yielded to the force of public opinion and a resolution for such a change in our Constitution passed that body.

With the development during recent times of the great corporate interests of the country, and the increased importance of legislation relating to their affairs, they have tenaciously sought to control the election of Senators friendly to their interests. The power of these great financial and industrial institutions can be very effectively used in the election of Senators by legislatures, and they have many times

during recent years used that power in a most reprehensible and scandalous manner. They have spent enormous amounts of money in corrupting legislatures to elect to the Senate men of their own choosing.

Through the influence of the Senators so elected, who have become known as corporation Senators, legislation to control the trusts and monopolies has been smothered in committees and defeated in the Senate. Under the operation of our political institutions Senators exercise great influence in the appointment of Federal judges; and by controlling the election of Senators these great interests have to a large extent been able to secure the appointment of judges who are more devoted to their interests than to the public welfare. These various abuses have been responsible for the rapid growth of the sentiment for a change in the method of electing Senators and for the adoption of a method that would make the power of the great financial interests less potent.

So, as I said in the beginning, the first session of this Congress is made historic by passing through the Senate a resolution for the direct election of Senators by the people. The historian will record that in 1911, 85 years after the first resolution was introduced in the House of Representatives, a joint resolution providing for an amendment to the Constitution changing the method of electing Senators passed the Senate for the first time. The narrative of its passage, its imprisonment in a conference committee, and its final passage is an interesting story.

WHAT WENT ON IN SUBCOMMITTEE.

On December 13, 1909, I introduced a resolution in the Senate providing for the direct election of Senators and asked that the resolution be referred to the Committee on the Judiciary, realizing that if it went to the Committee on Privileges and Elections it would meet the same fate that other resolutions referred to that committee had encountered. That committee had been organized apparently for the purpose of preventing any such proposition being brought before the Senate. My resolution was in substance the same as those that had passed the House in 1898, 1900, and 1902. It changed section 3 of Article I of the Constitution and provided that—

> The Senate of the United States shall be composed of two Senators from each State chosen at a general election by the electors thereof for a term of six years.

I had some difficulty in obtaining a report on the resolution from the committee. On February 7, 1910, in the open Senate, I inquired of Mr. Clark, of Wyoming, the chairman, as to the probable time of a report. On February 14, 1910, I brought the matter up again, renewing my request for a report. On June 17, 1910, I moved to discharge the committee from further consideration of the resolution, and on the following day I spoke briefly to that motion, calling attention to the fact that 37 States had declared practically for direct election of Senators—33 by resolution of their legislatures asking for such a change in the Constitution and 4 others by adopting primary systems for the nomination of Senators. Up to that time I had received little encouragement from the committee as to its probable report.

The resolution had one very ardent friend on the committee, Mr. W. E. Borah, the junior Senator from Idaho. During this long period

of delay Mr. Clark had advised me that he was going to appoint a subcommittee to consider the measure and kindly asked if there was any member of the committee that I was especially desirous of having on that subcommittee. I told him I would be greatly pleased if he would make Mr. Borah one of its members. This he did, and every friend of the measure should feel grateful to Mr. Clark for so doing; for, if it had not been for Mr. Borah's tireless work in behalf of the resolution, in my judgment it would have died in the committee, as most of its predecessors had done.

The subcommittee consisted of Mr. Dillingham, of Vermont; Mr. Rayner, of Maryland; and Mr. Borah. Dillingham was opposed to any resolution changing the present method of electing Senators. Rayner was opposed to the resolution in the form that I had introduced it and wanted it in the same form as passed by the House in 1893. Borah was anxious and determined to get some kind of a report.

At the time the resolution was reported in that form none of us realized what were to be the serious results of this change in its provisions. As introduced, it provided only for changing section 3 of article 1, which relates to the election of Senators. As reported, it not only changed the method of electing Senators but also changed section 4 of the same article, thereby taking from the Federal Government all control over the times and manner of electing Senators.

Section 3 now provides that:

> The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

My resolution simply proposed to amend this section by substituting for the words "chosen by the legislature thereof." the words "chosen at a general election by the electors thereof," so that it would read:

> The Senate of the United States shall be composed of two Senators from each State, chosen at a general election by the electors thereof for a term of six years.

It did not change section 4 in any way, thereby leaving the Federal authority over the times and manner of holding elections just as it is now and as it has been since the Constitution was written by the fathers of the Republic. Section 4, which the committee sought to change, reads:

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to places of choosing Senators.

The committee resolution proposed to strike out the following clause in this section: "but the Congress may at any time by law make or alter such regulations." There is no reason for striking out those words because of the change in the method of electing Senators. They confer a power on the Federal Government in the matter of electing Senators, and that power is just as essential whether the Senators are elected by a direct vote or by the legislatures. The truth is that the power conferred upon the General Government under section 4 has not often been used; but that is not a valid reason for taking it away. In 1866 it was made the basis of important legislation in fixing the times when the legislatures should elect their Senators.

J. P. Stockton, of New Jersey, had been elected by the New Jersey Legislature and commissioned by the governor, though he had received only a plurality—not a majority—of the votes cast in the legislature. A contest was made and his right to a seat questioned. On March 23, 1866, a vote was taken and Stockton was permitted to retain his seat by a majority of one, he himself casting that vote. The impropriety of counting Stockton's vote for himself and the danger of the precedent of seating a Senator elected only by a plurality of the votes in the legislature caused intense criticism, and three days later the Senate reversed its action and Stockton was deprived of his seat.

Then a law regulating the times and manner of holding senatorial elections was enacted. It provided that on the second Tuesday after the meeting and organization of a legislature, when a Senator is to be elected, the two houses shall meet separately and by a viva-voce vote name a Senator. On the following day the two houses shall meet in joint assembly and the results of the voting shall be canvassed. If each house has given a majority vote to the same man he is elected; if not the joint assembly shall meet at noon of each succeeding day during the session and take at least one vote—until a Senator shall be elected. Since that time every Senator who has been elected has been chosen under this statute.

On January 11, 1911, over a year after the resolution was referred to the committee, it reported the substitute for the resolution I had introduced, which substitute took from the Federal Government the authority granted it by section 4 of article 1. This provision became a source of animated discussion. Mr. Sutherland, of Utah, a member of the committee, offered an amendment striking out that part of the resolution repealing the clause in section 4; and after a heated debate running through several weeks that amendment was adopted, receiving all the Republican votes but eight and one Democratic vote.

THE FIGHT OVER SECTION 4.

A number of Republicans voted against the Sutherland amendment because they believed the resolution would receive more votes in the Senate with the part repealing section 4 in than if it were stricken out, and though not in sympathy with the change curtailing the Federal power, they felt that it was better to have the resolution passed—even if it changed section 4—than not to pass it at all; so they yielded their judgment in regard to the advisability of changing that section rather than endanger the passage of the resolution.

The vote on the resolution was had on the 28th of February; but previous to that Senator Root had made an inflammatory speech against the South because of the method employed by the Southern States in depriving negroes of the right of suffrage. Senator Bacon had replied with equal animation. These two Senators, both of whom were opposed to the proposition, because of their prominence and the ability with which they thrashed over the negro question and the old State-rights doctrine, attracted a great deal of attention to that part of the resolution reported by the committee which repealed the clause in section 4. Senator Borah in an extended speech in the Senate took the position that the change in section 4 would not have the effect claimed by either Senator Root or Senator Bacon.

Unfortunately, as a result of this debate, it became apparently more of an issue as to whether section 4 should be changed than as to whether we should change the method of electing Senators. There are a great many people in the country who sincerely and earnestly believe that it would be unfortunate and dangerous to take from the Federal Government the power given it by section 4; and since this is not a new power granted by one of the amendments that grew out of the slavery controversy and the Civil War they can not understand why southern Senators and Congressmen should demand its repeal. Why should we now go back and take from the Federal Government an authority that was given it by its original framers unless there appears to be some valid reason for taking from the General Government that power?

An intense race prejudice exists in the South, and to array this prejudice against the amendment as it passed the Senate was not improbably the purpose of some Senators who opposed the resolution. They not only appealed to the race prejudices, but also to the doctrine of State rights, which is still dear to many southern Democrats. These foreign questions were injected into the discussion in the Senate and used by the Senators who are opposed to the direct election of Senators.

I do not believe section 4 should be changed. I think the Federal Government ought to have the power that it confers. I think it was of vital concern in 1866, when the Stockton controversy was up. At one time I was ready to sacrifice my belief in that respect if by so doing I could get the resolution changing the method of electing Senators adopted, because I considered that of the most vital consequence to our country. One thing is certain, the Senate must become more responsive to public opinion than it has been in recent years, and it will be made so by the American people even if they have to nullify the provision in the Constitution relating to the election of Senators, by passing State laws, such as the Oregon law, which requires the people of the State to select at the general election a candidate for United States Senator whom the legislature is practically directed by State statute to elect. The people will govern this country and protect themselves from the powers of greed and avarice in spite of the Constitution if they have to. This they have done in the election of their Presidents, and in time they will do so in the election of their Senators.

VICTORY AFTER COUNTLESS DEFEATS.

On February 28 the resolution came to a vote. For more than half a century every device known to parliamentary practice had been resorted to to prevent the Senate from taking a record vote on the proposition; but at last the vote was taken, and the resolution was defeated, the vote being 54 for and 33 against. Two-thirds being required, it lacked 4 votes of having a sufficient number.

The new Congress was convened by the President on April 4, and 10 Senators who had voted against the resolution had retired. From careful inquiry I learned that at least 6 of the 10 new Senators would have voted for the resolution if they had been members of the Senate when the vote was taken. So I determined, with the convening of the Senate, immediately to introduce the resolution in the same form as it had been voted upon, feeling certain that if we could get it to a

vote again in that form it would pass without question. So on April 6 I introduced the resolution. It was again referred to the Committee on the Judiciary.

Meantime the House of Representatives had passed a resolution in the same form as it was reported to the Senate by the Senate committee at the former session. This House resolution, when it came over to the Senate, was also referred to the Senate Committee on the Judiciary, and that committee promptly reported out the House resolution in lieu of the one I had introduced. I at once offered the resolution in the form I had introduced it, and as voted upon at the former session, as a substitute for that reported by the committee, feeling confident not only that it was the best form, but that it would be more certain of passage in that form than in any other.

This substitute, commonly called the Bristow amendment, was debated with the same animation as had been the amendment offered by Mr. Sutherland at the former session. Mr. Bacon, of Georgia, led the opposition, claiming that it was conferring upon the Federal Government authority to enact force bills and send armies and United States marshals into Southern States to intimidate voters, though the Senator from Georgia must know that there never have been and never will be United States troops or marshals sent to the South under section 4, if it remains in the Constitution. It was not under the powers conferred by that section that President Grant sent troops to supervise southern elections, but under the fourteenth amendment.

Many extravagant assertions were made as to the results of electing Senators by a direct vote without changing section 4—the same old play upon sectional prejudices was indulged in. So vigorous was the attack by a number of opponents of the resolution that an impression was created in many sections of the country that I was trying to add new powers of control to the Federal Government, when, in fact, I was only seeking to preserve in the Federal Government an authority that it has had since the beginning.

On the adoption of the substitute there was a tie vote in the Senate, the Vice President casting the decisive vote in its favor, so that the resolution came before the Senate for final action on June 12, 1911, in exactly the form in which it was voted upon on the 28th of February last. This time it carried by a vote of 64 for and 24 against, receiving 5 more than the two-thirds, thus confirming the judgment of the Senators who believed it was more certain of passage in that form than in any other. If the substitute had not been adopted, from the most accurate information the resolution would have lacked two or three votes of a sufficient number to pass.

The passage of the resolution was a great triumph. After 85 years of agitation both Houses had agreed that Senators should be elected by a direct vote instead of by the legislatures. The Senate, however, having rejected the change in section 4, as provided by the resolution that had passed the House, the bill went to conference—and there it remained, the representatives of the two Houses disagreeing on the paragraph repealing a part of section 4. Mr. Rucker, of Missouri, was the chairman of the committee of the House, and he, after months of conference, finally recommended to the House that it accept the Senate resolution. This he could very consistently do, for, as a Member of the House in 1900, he voted in favor of the resolution that then passed, which is substantially the same as that which passed the Senate this year.

Champ Clark, present Speaker of the House, was also a Member of Congress in 1900, and he voted for the resolution as it then passed, which was substantially the same as the Senate resolution. So did Underwood, of Alabama; Burleson, of Texas; Clayton, of Alabama; Newlands, of Nevada; Kitchin, of North Carolina; Livingston, of Georgia; Lloyd, of Missouri; Stephens, of Texas; Taylor, of Alabama; and Williams, of Mississippi—all, with the exception of Livingston, of Georgia, now Democratic leaders in Congress. Senators Williams and Bankhead were both Members of Congress in 1900 and voted for the resolution, but as Members of the Senate this time they both voted against the resolution, because it did not repeal the clause in section 4.

From this record it clearly appears that these Democratic leaders in the past favored the resolution for the direct election of Senators in practically the exact form in which it passed the Senate. It is very fortunate that Mr. Rucker and his Democratic advisers yielded the point, for otherwise by holding up this great national reform in order to force a change in section 4 they would have shifted the entire controversy from the question as to whether the people shall elect their Senators by a direct vote to that of the advisability of taking from the Federal Government the control over the election of Senators that the Fathers of the Republic gave it when they framed the Constitution.

On May 13, 1912, the House voted on Mr. Rucker's report and the resolution passed by a vote of 237 for to 39 against. This overwhelming vote of the House was exceedingly gratifying to the friends of the measure, and Mr. Rucker deserves high praise for his earnest devotion to this great cause. The resolution as finally passed leaves the Federal Government with the same authority to regulate the election of Senators that it now has over the election of Members of Congress.

Congress, at the extra session of 1911, passed a corrupt-practices act requiring every candidate for the Senate, not only in a State primary, but before a State legislature, to declare under oath before and after the primary, and before and after the election, the amount of money he has expended. Promises of political patronage of any kind are forbidden.

The authority that the Federal Government has to enact such a corrupt-practices act is conferred by the Constitution in the very provision of section 4 that it was sought to repeal, and we certainly should not have taken any course that would weaken the Federal Government in enforcing such a statute. We do not believe that anyone, after reflection, who favors the direct election of Senators would want the authority of the Federal Government so changed.

Congress now having acted, it is hoped that the State legislatures will ratify the resolution as promptly as possible, so that the people may enjoy the fruits of this great reform. An effort may be made in some sections of the country by those who are opposed to the change in the method of electing Senators to stir up opposition because of some side issue, but I have faith in the judgment of the great mass of the American people and believe that they will eagerly avail themselves of the opportunity to bring the Senate nearer to the people and make it more quickly responsive to the public will, and that the amendment will be speedily ratified

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VALENTI *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

No. 773. Decided January 20, 1969.

292 F. Supp. 851, affirmed.

John Manning Regan for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Ruth Kessler Toch,* Solicitor General, and *Jean M. Coon,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.